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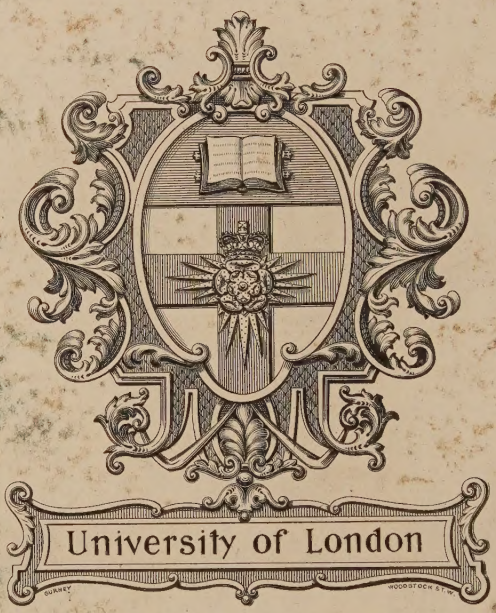

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

JARRAH TIMBER AND WOOD PAVING CORPORATION, LIMITED *v.* SAMUEL.

C. A. 1903 Feb. 10, 11.

[1902 J. 329.]

Mortgage — Stock — Limited Company, Mortgage by — Clog on Equity of Redemption — Option to purchase Mortgaged Stock — Debenture Stock — Redeemable Stock — Irredeemable Stock, Power to issue.

A loan was made to a limited company on the terms of a letter whereby the borrowers agreed to secure the repayment of the loan with interest by the transfer of certain redeemable debenture stock of the company, and it was stipulated that the lender should have the option of purchasing the whole or any part of the debenture stock at 40 per cent. at any time within twelve months, and that the advance should become due and payable with interest at thirty days' notice on either side :—

Held, affirming the decision of Kekewich J., [1902] 2 Ch. 479, that, within the principle laid down in *Noakes & Co., Ld.* v. *Rice*, [1902] A. C. 24; [1900] 2 Ch. 445, 457, the stipulation giving the option to purchase the mortgaged stock was a clog or fetter on the right of redemption and therefore void.

Carritt v. *Bradley*, [1901] 2 K. B. 550, distinguished.

The rule prohibiting the clogging of the equity of redemption under a mortgage by an individual applies equally to a mortgage by a limited company.

Whether a limited company can issue irredeemable debenture stock, *quære*.

THIS was an appeal by the defendant from the decision of Kekewich J. (1)

(1) [1902] 2 Ch. 479.

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The question was whether, in a mortgage of first mortgage debenture stock by the plaintiffs to the defendant to secure an advance, a stipulation giving the defendant the option of purchasing the whole or any part of the stock at 40 per cent. at any time within twelve months was a clog on the equity of redemption and therefore void.

The following facts should be added to those stated in the former report. The certificate of the plaintiff company's first mortgage debenture stock, which was secured on all their property and bore interest at 5 per cent., had the following condition indorsed: "The stock shall, at the option of the company, be redeemable on or at any time after the 1st day of January, 1920, at the price of 105*l.* per 100*l.*, or at any time *before* the 1st day of January, 1920, at the price of 110*l.* per 100*l.*," on giving to the stockholder six months' notice in either case.

On October 19, 1901, the defendant gave the plaintiffs thirty days' notice to pay off his advance of 5000*l.* On November 29, 1901, when that notice expired, no payment was made, and on November 30, upon the request of the directors of the plaintiff company, he agreed to extend the time for payment to December 6, 1901. On December 5 urgent representations were made to him by the directors to withdraw his notice altogether, whereupon, on the same day, he withdrew it, and on the following day, December 6, he received a letter from the directors thanking him for his withdrawal.

On December 18, 1901, the plaintiffs offered to pay the defendant 5000*l.* if he would release his option of purchasing the mortgaged stock; but he refused the offer.

On February 20, 1902, the plaintiffs' then solicitor made an offer, on behalf of a client, to the defendant, but without the knowledge of the plaintiffs, to buy the security, together with the option, for 10,000*l.*

While that offer was under consideration by the defendant, the plaintiffs' then solicitor, on February 27, 1902, called upon the defendant on behalf of the plaintiffs and informed him that they repudiated their offer to purchase the release of his option for 5000*l.*, upon the ground that the option was void altogether, as being a clog upon the equity of redemption of the stock.

(It was alleged on the part of the plaintiffs at the trial before Kekewich J. that the solicitor tendered the defendant the amount of his principal, interest, and costs, and that the defendant refused to accept the tender; but on the part of the defendant the tender was disputed, and the learned judge found, as a fact, that no such tender had been made.) On the same day, February 27, 1902, after that interview, the defendant by letter, as stated in the former report, gave the plaintiffs notice that he thereby exercised his option to purchase in regard to the whole of the mortgaged stock, and thereupon the plaintiffs at once commenced the present action.

The defendant counter-claimed for specific performance of the agreement, and for damages.

At the trial Kekewich J. gave judgment for the plaintiffs, declaring that the stipulation giving the defendant an option to purchase at any time within twelve months at 40 per cent. was void, and that they were entitled to redeem, and have the stock transferred as they should direct on payment of whatever was due for principal, interest, and costs, with consequential relief.

The defendant appealed.

P. O. Lawrence, K.C., and *J. W. Manning*, for the defendant, repeated the arguments urged by them in the Court below upon the general law as to clogging the equity of redemption, and cited in support of it *Lisle* v. *Reeve* (1), *Biggs* v. *Hoddinott* (2), and *Santley* v. *Wilde*. (3)

[COZENS-HARDY L.J. I doubt whether, having regard to what Lord Davey said in *Noakes & Co., Ld.* v. *Rice* (4), *Santley* v. *Wilde* (3) can now be regarded as good law.

ROMER L.J., as to a mortgagee stipulating for a collateral advantage, read the passages in 1 Robbins on Mortgages, pp. 14–15, which, his Lordship said, stated the rule too broadly.]

In *Carritt* v. *Bradley* (5) the fetter was similar to that here,

(1) [1902] 1 Ch. 53.
(2) [1898] 2 Ch. 307.
(3) [1899] 2 Ch. 474.
(4) [1902] A. C. 24, 34.
(5) [1901] 2 K. B. 550.

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and was treated as good. This case does not fall within either of the tests stated by Stirling L.J. in delivering the judgment of the Court in that case.

The contract here was a fair and reasonable one between business men, and therefore the Court will give effect to it: *Printing and Numerical Registering Co.* v. *Sampson* (1); *E. Underwood & Son, Limited* v. *Barker*. (2) This case is not within *Noakes & Co., Ld.* v. *Rice* (3), and for this reason, that the option given here is an option to purchase debenture stock that is redeemable, and the contract is to make a further loan to the company on specified terms in consideration of a charge upon its assets. It is no "clog" at all: it is merely an agreement to make a further advance. Such a contract may be incapable of specific performance: *South African Territories, Limited* v. *Wallington* (4); but we do not insist on specific performance; we are content to rely on our claim for damages. Issuing debenture stock at a discount is not illegal: *Campbell's Case* (5); *Webb* v. *Shropshire Rys. Co.* (6) Debentures are an exception from the general rule as to clogging the redemption: Palmer's Company Precedents, 8th ed. Part III. p. 94; if so, there is no reason why the company issuing them cannot impose any conditions it chooses. The bargain here is, in substance and effect, a bargain for a loan to the company of 13,000*l.* for twenty years in consideration of 30,000*l.*: that is a good bargain between business men, though not specifically enforceable.

[ROMER L.J. referred to *Attree* v. *Hawe*. (7)]

In *London and Globe Finance Corporation, Limited* v. *Montgomery* (8) Lord Alverstone C.J. refused to apply the rule as to clogging in *Rice* v. *Noakes & Co., Ld.* (9) and *Lisle* v. *Reeve* (10) to shares in a limited company.

[ROMER L.J. referred to *Browne* v. *Ryan*. (11)]

In that case there was an absolute agreement to sell the

(1) (1875) L. R. 19 Eq. 462, 465.
(2) [1899] 1 Ch. 300, 305.
(3) [1902] A. C. 24.
(4) [1897] 1 Q. B. 692; [1898] A. C. 309.
(5) (1876) 4 Ch. D. 470.
(6) [1893] 3 Ch. 307.
(7) (1878) 9 Ch. D. 337.
(8) (1902) 18 Times L. R. 661.
(9) [1900] 2 Ch. 445.
(10) [1902] 1 Ch. 53.
(11) [1901] 2 I. R. 653.

land, and to sell through the mortgagee himself, who was an auctioneer. In *In re Edwards' Estate* (1) the mortgagee had an option to purchase the mortgaged premises at the end of two years, if the mortgagor should then be unable to redeem, so that the right to redeem would in that event be lost for ever. There is nothing of the kind here. The security is the debenture stock plus the option. That option is saleable at any time pending the mortgage. The rule as to clogging does not really apply to these commercial bargains. Though we cannot produce any direct authority on the point, we submit that a company formed under the Companies Acts is outside the rule as to clogging.

[ROMER L.J. Why?]

It is difficult to see the reason; but a company that has power to issue debenture stock may make it either redeemable or irredeemable, and may, when issuing redeemable stock, stipulate that it shall not be redeemable except on certain conditions. If so, why should not they be at liberty to put on any fetter they like, and say to the stockholder, "You shall not redeem except on certain terms"? If a company can make its own security irredeemable, as we submit it can, that goes much further than this case.

[COZENS-HARDY L.J. referred to Ashburner on Mortgages, p. 155.]

Warrington, K.C., and *Martelli*, for the plaintiffs, were not called upon.

COLLINS M.R. This is an appeal from a decision of Kekewich J., by which it has been held that a certain stipulation in a contract between a mortgagor and mortgagee of debenture stock was a clog on the equity of redemption. The contract is contained in a letter dated June 11, 1901, addressed to the plaintiffs, and signed by the defendant. The letter is as follows: [His Lordship read it, and continued:—]

The question arises whether the clause giving the mortgagee an option to purchase the stock at 40 per cent. at any time within twelve months does or does not constitute a clog on

(1) (1861) 11 Ir. Ch. Rep. 367.

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the equity of redemption. The company say that it is a clog on the equity of redemption, and therefore void, and that they are not bound. The learned judge in the Court below has upheld that view.

Now we have had a very elaborate argument on behalf of the appellant in which all the cases have been discussed, and it has been contended that that stipulation does not come within the meaning, as interpreted by the Courts up to the House of Lords, of "a clog upon the equity of redemption." In my opinion, the learned judge was perfectly right in his decision, and, as he himself says and as it seems also to me, the case is a clear one—that is to say, it is clearly on one side of the line. Whether it is an easy line to determine exactly or not, it seems to me that this case is clearly on that side of the line which constitutes it a clog on the equity of redemption. For what is the effect of the stipulation? It is that the mortgagors, on repaying their 5000*l.* debt, do not get back the thing which they mortgaged unimpaired, unfettered, and free from conditions, but get it back with a superadded condition binding upon them, at all events to the extent of making them liable in damages if they do not perform it, and possibly—though I do not decide the point—subject to other remedies against them. They get back the thing mortgaged subject to the condition of handing it back to the mortgagee if they carry out their engagement with him, or, if they do not, paying damages to him for not doing so. On the authorities, is that a clog on the equity of redemption? I think this case clearly comes within the latest decision of the House of Lords upon this point: *Noakes & Co., Ld.* v. *Rice* (1); and I simply refer to one passage from the speech of Lord Macnaghten (2), who states the principle thus: "Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when

(1) [1902] A. C. 24. (2) [1902] A. C. 30.

the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security." That is the statement by Lord Macnaghten of the principle which has been always accepted, though there has been a difficulty in some cases in applying it. The cases have been discussed before us, and were also discussed in the House of Lords, and among them is a very recent one from Ireland—*Browne* v. *Ryan* (1)—which received special attention and approval and which is peculiarly applicable here, because in that case that which was held to be a clog on the equity of redemption was a personal contract by the mortgagor. I will refer to a passage in the judgment of Andrews J. which seems to me to express most exactly what the nature of the fetter is where the contract imposes an obligation upon the mortgagor himself, not necessarily inhering in and being annexed to the res or thing offered as security. He says (2): "It is the right of a mortgagor on redemption, by reason of the very nature of a mortgage, to get back the subject of the mortgage (in the present case the mortgaged lands) to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so, that which he is entitled to on redemption is prevented, and to constitute such prevention it is not necessary that the subject of the mortgage should be directly charged with whatever causes the prevention. If he be so prevented in fact, the equity of redemption is affected by what, whether very aptly or not, has been always termed 'a clog.'" Then he proceeds to deal with the particular facts of that case, and says: "Now, how was Ryan's right of redemption affected under the agreement of the 21st of June, 1898? According to that agreement, if the mortgage debt should remain outstanding for twelve months, though the mortgage would be still a mortgage, his right on redemption to get back the mortgaged lands would be gone. It would be both prevented and annihilated; he was bound by the agreement to sell by auction within twelve months. If he redeemed within twelve

(1) [1901] 2 I. R. 653. (2) [1901] 2 I. R. 667.

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months he would not get back the land to hold and enjoy it as he was entitled to do before the mortgage. He would get it back with a superadded obligation to sell it by auction within the twelve months, and in either case the agreement purported to bind him, in addition to paying the principal and interest of the mortgage debt, to pay Browne a further sum equal to 5*l.* per cent. on what the lands should be sold for, whether it was sold through Browne or not. This sum it now appears would be equal to more than 30 per cent. on his advance. Although it may be admitted that these obligations cannot be properly regarded as charges on the land, they would nevertheless directly and seriously affect the mortgagor with respect to the land, and his rights in relation to it."

That appears to me to be a very exact summary of the principle itself, and of the application of the principle to that case. If that is right, it seems to me on all fours with this case, because the effect here is that the mortgagors find themselves under a contract in respect of the res which obliges them either to annihilate their equity of redemption by parting with it absolutely, or, at all events, to pay damages if they do not. If that is the true view of the contract, it seems to me to fall exactly within those principles.

Mr. Lawrence has addressed a very ingenious argument to us that, assuming that this would be a clog on the equity of redemption in ordinary cases, it is not so having regard to the special circumstances of this case, this being a loan on the security of debenture stock, so that the rule of equity as to clogging the equity of redemption does not apply to this case at all. His argument, as I understand it, is this. He says: "Companies have a right to issue irredeemable debenture stock. It is true the plaintiffs have not done so in this case, but, assuming that they have that right, they have also a right to raise money, if they choose to do so, on the security of that stock—to raise it on the terms that it shall be irredeemable; and if they have that right that involves the right to impose any clog on the equity of redemption—to impose any obligation slighter than the entire obligation which they have a right to impose, viz. that the debenture security shall never be redeemed

at all." Without going into the question whether it is competent or not for a company to issue irredeemable debenture stock, it seems to me that in this particular case it really cannot affect, and does not affect, the rights of the parties, because the subject-matter of this contract, the security offered, was not irredeemable debenture stock at all; it was debenture stock which is redeemable under certain special conditions. That is the security itself; but the contract was really not for the issue of debenture stock to a debenture stockholder, but was a mortgage of certain debenture stock as the consideration for an advance. It is a loan on security, and the security offered is the debenture stock. If it is a loan on security, it seems to me there is nothing whatever to take it out of the ordinary rule of equity, that that loan upon security must be subject to the right to exercise the equity of redemption and to get back the res unfettered, as I have already stated. Therefore, it seems to me that Mr. Lawrence's argument on that point fails. Whether the company have that right to issue irredeemable securities or not, the particular security in this case was not irredeemable, and did not purport to be irredeemable.

Then we were also pressed with the decision of the other Division of the Court of Appeal in *Carritt* v. *Bradley* (1), in which Stirling L.J. delivered the considered judgment of the Court, and it was contended on behalf of the appellant that in that case there remained a fetter analogous to the fetter in this case, and that although that fetter remained upon the mortgagor after redemption the transaction was nevertheless treated as valid by the Court of Appeal. But when that case is examined I do not think that the Court held anything of the sort. There a certain gentleman, having a considerable interest in a company, borrowed money from a broker who desired to act as the broker of the company, and borrowed it from him on the security of certain shares. He stipulated that he would do his best to secure the business of the company for that particular broker; but it was no part of the contract that he should not, if he redeemed, dispose of the shares at any time, and,

(1) [1901] 2 K. B. 550.

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though the contract to do his best to employ the broker was held to extend beyond the period for redemption, there was also a stipulation that if the broker was not employed he, the borrower, should pay him the same commission as he would have got from the company if he had been employed as broker. Stirling L.J., in delivering the judgment of the Court, held that that obligation did not affect the shares. He said it would have been just the same whether the loan was obtained on personal security or on the security of shares. The shares after redemption were precisely in the same condition as they were before redemption; there was no obligation whatever undertaken in respect of them. The mortgagor was at liberty to part with them after redemption, and, in fact, his rights in that respect were absolutely unfettered. That was the ground of the decision of the Court. The Lord Justice pointed out that this particular obligation was not a clog because, in the judgment of the Court, it did not affect the shares and did not affect the mortgagor in his right to the shares; and, if that view was correct, *Carritt* v. *Bradley* (1) is certainly not an authority against the conclusion at which I have arrived in this case.

It seems to me that it is not necessary to go through the authorities, which were all dealt with in the final decision of the House of Lords in *Noakes & Co., Ld.* v. *Rice.* (2)

On these grounds I think that the judgment of the learned judge was perfectly right and must be affirmed.

ROMER L.J. I am of the same opinion. The appellant's counsel discussed the question as to what is the true legal character, if I may so describe it, of debenture stock issued by a company when the stock is irredeemable, except by the company on terms. But it appears to me that any such question as that does not call for our decision on the present appeal. Whatever the character of the debenture stock really is, even treating it as creating only a liability on the part of the company to pay an annual sum which the company may redeem on terms, yet in any point of view it creates a liability to pay

(1) [1901] 2 K. B. 550. (2) [1902] A. C. 24.

money on the part of the company, and in the case before us money secured on the company's property. That being so, it is clear that the transaction which is the subject of this appeal was one of loan by the defendant to the plaintiffs of 5000*l.* repayable at thirty days' notice on either side charged upon 30,000*l.* worth of stock and secured by the company's mortgage. Whatever may be the nature of the debenture stock, I think that that transaction constituted a mortgage security in the ordinary sense—one to which the ordinary rules of equity affecting mortgage securities apply. Now one of those rules prevents the equity of redemption being, as it is called, clogged or fettered. It was boldly claimed on behalf of the appellant that because the mortgagor here was a limited company the rule as to clogging in cases of mortgages by a company does not apply. The learned counsel could give no real reason in support of such a contention, and I need only say that it appears to me to be incapable of substantiation. I see no reason why a mortgage by a company should be in any different position from that of a mortgage by a private individual so far as regards the clogging of the equity of redemption.

Then again it is said on behalf of the appellant that the transaction between the plaintiffs and the defendant was, if properly regarded, really one by which the defendant purchased an option, and that any reference there may have been in the memorandum of the transaction to a mortgage security was a mere small collateral matter, which might in substance be disregarded, and that the main object of the transaction was the purchase of the option. I will not pause to consider whether, even if that allegation could have been substantiated, the transaction, so far as regards the security, however minor in importance it may have been, could be freed from the rule as to clogging; for to my mind it is clear, looking at the terms of the letter of June 11, 1901, which formed the basis of the transaction between the parties, that the transaction was really in principle and substance a mortgage transaction between a mortgagor and a mortgagee with certain collateral benefits stipulated for by the mortgagee as mortgagee and in no other

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capacity. That being so, it appears to me that the rule as to clogging is clearly applicable to such a security as we find here. The question then is, Has there been a clogging in fact within the purview of the rule? I think there has been, having regard to the authorities, and particularly to the last authority in the House of Lords, which is a guide to us, *Noakes & Co., Ld.* v. *Rice*. (1) I am satisfied, on the construction of the letter of June 11, 1901, that the twelve months' option there given to purchase the stock was not limited or intended to be limited to what I may call the redemption period, that is to say, that it was intended to be exercised, and in its terms was exercisable, even if during the twelve months the mortgagors had paid off their principal, interest, and costs. On the terms of the contract, therefore, it is to my mind clear that, even if before the twelve months all that was really due on the mortgage security had been paid off, the clause with regard to the option still applied, and was intended to apply to and affect, the stock which was the subject of the option. That being so, it is also clear on the face of the letter that the option given to the mortgagee purported directly to affect the mortgage security. It purported to give an option to the mortgagee to purchase "the whole or any part of such stock"—"such stock" clearly referring to the mortgaged stock and to no other stock. It purported, therefore, to give power to the mortgagee in any point of view to pay a sum of money to the mortgagor on terms of getting a much larger sum of mortgage debenture stock, which, as I have said, was secured on the company's property. That option purports to bind and affect the mortgage security in the hands of the mortgagors even after payment of principal, interest, and costs. It appears to me, then, clearly to fall within the principle I have referred to, and is a clog on the equity of redemption.

It was contended on behalf of the appellant that this option ought not to be held a clog, because it was not a provision which could be specifically enforced. But, even assuming that to be so (I will not pause to consider whether such a provision could be enforced or not), the fact that it could not be speci-

(1) [1902] A. C. 24.

fically enforced does not, in my opinion, render that fettering clause good. That appears to me also to follow from what was said by the members of the House of Lords who took part in the decision in *Noakes & Co., Ld.* v. *Rice* (1), for *Browne* v. *Ryan* (2) was there referred to and approved by all the noble Lords, except by Lord Lindley, who said: "I am not satisfied that the Court of Appeal in Ireland did not go too far in holding that the plaintiff's action for damages could not be sustained." With that exception all the noble Lords, as I gather from the report of the case, approved of the decision in *Browne* v. *Ryan*. (2) Now it is noticeable, when the facts of *Browne* v. *Ryan* (2) are looked at, that the fettering clause there was one which could not have been specifically enforced, and nevertheless it was decided that the whole clause was bad, and could not be enforced by the mortgagee even so far as it concerned a claim on it for damages for breach. It appears to me that in questions such as I am now considering we are bound to follow loyally the views pointed out by so large a majority of the Lords who decided the case of *Noakes & Co., Ld.* v. *Rice*. (1)

That being so, it is clear to my mind in the present case that the clause which I have pointed out as a fettering clause or clog on the equity of redemption is wholly bad, even though it might not have been capable of being specifically enforced. The principle, as I understand it, which really governs cases of this kind is that stated by Rigby L.J. in *Rice* v. *Noakes & Co., Ld.* (3), where he said: "The property which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not either expressly or by implication reserve to himself any hold upon the property after the time for redemption has arrived and the right of redemption has been put in force." Here this fettering clause purported to give, as I have pointed out, to the mortgagee a hold upon the property which falls within the mischief referred to by Rigby L.J.

I will only say further that with regard to the case of *Carritt*

(1) [1902] A. C. 24. (2) [1901] 2 I. R. 653.
(3) [1900] 2 Ch. 445, 457.

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v. *Bradley* (1), as has been pointed out by the Master of the Rolls, the ground of decision in that case clearly renders it no authority which affects our decision on this appeal. *Carritt* v. *Bradley* (1) is clearly distinguishable. The governing principle in *Carritt* v. *Bradley* (1) was that the stipulations which were there said to form a clog did not bind, or really attempt to bind, the shares which constituted the mortgage security. I therefore agree in thinking that this appeal fails, and should be dismissed.

COZENS-HARDY L.J. I agree. In substance this is a mortgage transaction by which, as part of the transaction itself, the mortgagee stipulates that he may by his own act cease to be a mortgagee and become a purchaser. It is argued by the appellant that under these documents no relief could have been obtained by way of specific performance, and that he could only have obtained damages. As at present advised, I do not agree with that view. It seems to me that there are two periods which would require consideration. The mortgagor could not redeem except on giving a thirty days' notice. The relation of mortgagor and mortgagee certainly subsisted until the expiration of the thirty days. If in that interval of time the mortgagee had given notice to exercise his option, as at present advised, I do not see that there could have been any answer to an action for specific performance of the agreement. It would have been simply a contract by the mortgagee to purchase the equity of redemption of the mortgaged property, and that, assuming there be no objection to the contract, is a contract of which the Court would enforce specific performance. No doubt if the thirty days had elapsed and the mortgagor had got back the debenture stock certificate, the case of *South African Territories, Limited* v. *Wallington* (2) would then have applied, and it may well be, and I think it would be the case, that the mortgagee could not then have claimed specific performance, as the remedy would have been in damages. But it is really not material to consider that distinction. If the former view as to specific performance is right, it seems to me that the

(1) [1901] 2 K. B. 550. (2) [1898] A. C. 309.

decision of Hargreave J. in *In re Edwards' Estate* (1) is directly and precisely in point. If the other view is right, then we have the decision of the Court of Appeal in Ireland in *Browne* v. *Ryan* (2), approved as it was by the House of Lords, that it does not really matter if the right to damages arises out of some contract directly relating to and purporting to affect the subject-matter of the mortgage.

It has been said, however, and it has been strenuously argued, that all these doctrines have no application at all to the case of a company; that a company can give mortgages such as an ordinary individual cannot give; that a company can give an irredeemable mortgage, and, if it can give an irredeemable mortgage without any right of redemption at all, then it must of necessity be able to impose any sort of clog on the equity of redemption. In the view which I take, it is not necessary to decide that point in the present case. The mortgaged stock here was not irredeemable, and, even if irredeemable stock might have been issued, I cannot see that that has any bearing on a transaction which was a separate and independent security given on stock of a different nature. But, as the matter has been mentioned, speaking only for myself, I desire to say that, as at present advised, I think, in the language of Lord Macnaghten, "redemption is of the very nature and essence of a mortgage," and I fail to see how, apart from some statutory authority, such as is given by the Companies Clauses Act, 1863, and subsequent statutes, there can be any right in a limited company to put itself in a better position than any other owner of property dealt with by way of mortgage. I only state this so that it may not hereafter be supposed that by silence I had acquiesced in the argument of the appellant.

Solicitors: *Dale, Newman & Hood; H. Percy Becher.*

(1) 11 Ir. Ch. Rep. 367. (2) [1901] 2 I. R. 653.

G. I. F. C.

C. A.
1903
March 19, 20.

In re BARONESS LLANOVER'S WILL. HERBERT *v.* FRESHFIELD.

[1902 L. 837.]

Settlement — Trust to keep up Mansion-house and permit A. to reside— Management, Trustees' wide Powers of—Rents and Profits, Receipt of by Trustees—"Tenant for Life"—"Possession"—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5.

A testatrix devised all her real estate to trustees upon trust "to enter into possession or receipt of the rents and profits of or to manage or superintend the management of the same." The will gave the trustees extensive powers of management. The testatrix then directed the trustees to pay certain annuities to her daughter, and, subject thereto, to apply such annual sums as should be necessary for keeping certain mansion-houses and the gardens and grounds thereof "in a fit state for residence," including the payment of wages of all servants and other persons employed by the trustees in and about such mansion-houses, gardens, and grounds, "and shall permit my said daughter at any time and from time to time during her life to reside at the said mansion-houses, gardens, and grounds"; and that during any and every such residence by her said daughter, "under such permission as aforesaid," the trustees should, out of the rents and profits (subject to the prior payments thereout thereinbefore directed), pay to her said daughter an allowance of 80*l.* per week during such residence. And the testatrix, after giving similar rights of residence to grandchildren, directed that the furniture, &c., in the said "residences" respectively should be annexed thereto as heirlooms to be enjoyed by the person or persons for the time being entitled to the same residences under the limitations thereinbefore directed:—

Held, that the daughter came within the definition of a "tenant for life" in s. 2, sub-s. 5, of the Settled Land Act, 1882, as being "the person for the time being beneficially entitled to possession of settled land for her life."

Decision of Swinfen Eady J., [1902] 2 Ch. 679, affirmed, with a variation.

Per Romer L.J.: The policy of the law is to regard the provisions of the Settled Land Acts as being beneficial, and not to cut down the class or number of persons coming within the definition of "tenant for life."

APPEAL from the decision of Swinfen Eady J. (1)

The facts are stated in the report below. It is only necessary to add to the statement of the will the following heirlooms clause (clause 7): "I direct that all the furniture, plate,

(1) [1902] 2 Ch. 679.

pictures, china, and effects, in and about the two said residences at Llanover, the residence called Abercarn Uchaf and the residence in Great Stanhope Street respectively, or such of the same effects as I shall not otherwise dispose of, and except as hereinafter mentioned, shall be annexed to the said residences respectively as heirlooms to be enjoyed by the person or persons for the time being entitled to the same residences respectively under the limitations hereinbefore directed, as far as the law will permit."

The appeal was heard on March 19 and 20, 1903.

Haldane, K.C., and *Howard Wright*, for the appellants, the defendants, the trustees of the will. For a person to be a tenant for life under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), he must, under s. 2, sub-s. 5, be "the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life"; and under sub-s. 10 (i.) "possession includes receipt of income." Thus no one is "tenant for life" unless he has "possession." Here the possession is by the will, and also in law, in the trustees, and they are the persons in receipt of the income of the settled property. Sect. 58, enumerating the limited owners who are to have the powers of a tenant for life, does not assist the matter in question here.

The terms of this trust are not sufficient to make Mrs. Herbert a "person beneficially entitled to possession of settled land" within s. 2, sub-s. 5: *In re Atkinson* (1); *In re Edwards' Settlement.* (2) *In re Eastman's Settled Estates* (3) is distinguishable, for there it was clear that the testator intended personal possession, and there were no such extensive powers vested in the trustees as there are here; and so in *In re Carne's Settled Estates.* (4) To see whether there is a tenant for life "in possession" within the Act, it is necessary to look at the whole instrument; and, looking at this will as a whole, it seems clear that the testatrix intended that the "possession"

(1) (1886) 31 Ch. D. 577, 581.
(2) [1897] 2 Ch. 412.
(3) W. N. (1898) 170 (15); 68 L. J. (Ch.) 122.
(4) [1899] 1 Ch. 324.

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of these three houses should remain in the trustees. It does not follow that, if the trustees allow Mrs. Herbert to reside in these houses, they thereby cease to have possession. It has been held that a person has "possession" of a house for rating purposes, although he has let the greater part of it to lodgers: *Smith* v. *Overseers of St. Michael, Cambridge.* (1) "Possessio, in its primary sense, is the condition or power by virtue of which a man has such mastery over a corporeal thing as to deal with it at his pleasure, and to exclude other persons from meddling with it. This condition or power is detention; and it lies at the bottom of all legal senses of the word 'possession'": Wharton's Law Lexicon, 10th ed. That definition applies to the position of the trustees here. So, in Johnson's Dictionary, "Possession" is defined as "Having things in one's own hands or power." We do not say that a person may not be in "beneficial possession" as tenant for life under a settlement, although the trustees have extensive powers of management, but there are duties imposed on the trustees in this case which render it absolutely necessary that they should be the persons in "possession," in order to preserve the settled properties for those who will succeed Mrs. Herbert.

Warmington, K.C., and *H. Fellows*, for Mrs. Herbert. That extensive powers of management in trustees are not inconsistent with a claim by a person to have the powers of a tenant for life under the Act has been decided by *In re Jones.* (2) Sect. 2, sub-s. 5, is carefully worded. It does not say that to be a tenant for life a person must be "in possession" merely, but "beneficially entitled to possession." There are two kinds of possession, namely, personal occupation and receipt of rents and profits. "Beneficially entitled to possession" may mean either enjoyment of the rents and profits or enjoyment in specie. The extensive powers of management given to the trustees by this will, and also the duties cast upon them, are all in the nature of trusts for the benefit of Mrs. Herbert and those who come after her—to increase the enjoyment of the properties of which they are to have the benefit; and, moreover, the language of the direction is imperative—"shall" permit. The intention

(1) (1860) 3 E. & E. 383. (2) (1883) 24 Ch. D. 583; (1884) 26 Ch. D. 736.

of the testatrix is clearly to provide places of residence for her daughter Mrs. Herbert during her life. No one else is to reside there. Whether she chooses to reside there or not is beside the question. A person does not the less "reside" in a house because he temporarily goes elsewhere. The object of the testatrix is to give her daughter the most beneficial occupation of these residences possible, and to place her in the ordinary position of mistress of them, with the only difference that the ordinary expenses of an occupant are shifted on to the trustees. Our contention is supported by *In re Eastman's Settled Estates* (1), *In re Carne's Settled Estates* (2), and *In re Trenchard.* (3) The policy of the Act should also be considered, which is to render land a marketable article, notwithstanding the settlement; and in the interests of all parties the Act should be construed "in a spirit of wise and reasonable liberality": *In re Mundy and Roper's Contract* (4); *Lord Henry Bruce* v. *Marquess of Ailesbury.* (5) If the appellants' contention is correct, these properties will be locked up and incapable of being sold for a considerable time, which would be entirely contrary to the spirit and the policy of the Act.

We desired that the order should be made under s. 2, sub-s. 5, but the learned judge made it under s. 58, sub-s. 1 (ix.).

[COLLINS M.R. If you are right in your contention, you are entitled to an order under s. 2, sub-s. 5.]

Haldane, K.C., in reply.

COLLINS M.R. This is an appeal from a decision of Swinfen Eady J., who decided in favour of the lady, the applicant in this case, the question being whether under the will of Lady Llanover she can claim to be beneficially entitled to possession as tenant for life, or as having the powers of a tenant for life, within the meaning of the Settled Land Act, 1882.

The will of Lady Llanover undoubtedly gives very large powers to her trustees: it shews that she had a very earnest desire to give, as far as she could, a strictly Protestant and Welsh character to the estate she was dealing with; and she

(1) W. N. (1898) 170 (15); 68 L. J. (Ch.) 122.
(2) [1899] 1 Ch. 324.
(3) [1902] 1 Ch. 378.
(4) [1899] 1 Ch. 275, 288-9.
(5) [1892] A. C. 356.

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does give the trustees very ample powers of management, with directions that they are to employ about the estates mentioned in the will only persons of the Protestant religion and who speak Welsh. But there is also a provision—which I will deal with in a moment—which has for its object, it seems to me, the beneficial occupation by the lady of the mansion-houses, which are three in number.

Now it is admitted that powers of management, however extensive, are not incompatible with a person being tenant for life within the meaning of the Act and having the beneficial possession of the property. The definition upon which the question depends is that contained in the 2nd section of the Settled Land Act, 1882, sub-s. 5, which gives the following definition of a tenant for life: "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

There is another clause I should notice, being the clause under which the learned judge seems to have decided this case: it is s. 58, which defines the limited owners, other than a tenant for life, who have the powers of a tenant for life, and among these is included, by sub-s. 1 (ix.), "a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event." Mr. Warmington's argument has satisfied me that this lady is entitled under the first definition which I have read, that is, that she is a "person who is for the time being, under a settlement, beneficially entitled to possession of settled land," for life.

Bearing in mind what I have said as to the nature and general purposes of this will and the clauses of management, and so forth, I come to the clause which deals with the right of the lady to reside in the three houses mentioned. That is the 5th clause, and is as follows: [His Lordship read it, and continued:—]

Now, what is the meaning of that direction to keep the three mansion-houses or residences "in a fit state for residence"? For whom are they to be so kept? Who is to reside there? Certainly not the trustees. The person who is to reside there is the lady in question, and clearly the "residence" which is contemplated is a residence during her life. It is a life estate if it is anything. That appears clear from the direction to the trustees to permit the lady "at any time and from time to time during her life to reside at the said" mansion-houses. It is not a question of mere discretion on the part of the trustees to permit, because the terms of the will are peremptory, that "my trustees or trustee shall permit" the lady to reside. It seems to me, therefore, that this is clearly, on the face of the will, a "beneficial possession" within the Act. The provisions imposing certain duties upon the trustees are, on the face of them, provisions calculated to make the places fit, and to keep them fit, for residence, and provisions calculated, from the standpoint of the lady, to make such residence in all respects more beneficial. But whatever the nature of those provisions may be as to the trustees' powers and duties, they are certainly compatible with—or rather, I should say, they are not incompatible with—the right of the lady to say that she is in beneficial possession of the property as tenant for life under the terms of the statute. In fact, Mr. Haldane does not dispute that there may be powers of management, however extensive, which are not incompatible with that right. Upon that point there is a case which is quite conclusive, *In re Jones* (1), which was decided by Bacon V.-C. and affirmed by the Court of Appeal.

Now it seems to me that the only possible argument in the present case is that the powers and duties vested in the trustees under this will are so extensive as to be incompatible with any independent right of possession in this lady, and are such as to negative the possibility of her having such possession as is mentioned in the statute. That is really Mr. Haldane's point. He says that, looking at the whole will, the scheme of it is such that we must take it that this

(1) 24 Ch. D. 583; 26 Ch. D. 736.

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lady is not contemplated as being at any time in possession, but that at most it shews a casual licence which falls short of possession. I do not know that he absolutely defines who has the possession. That, no doubt, is a difficulty in his way, because he did, as I gather, admit that it was not contemplated that the trustees should ever beneficially occupy any of these houses themselves. So that what he is obliged to say, and what he does say, is that all these trusts with reference to the Welsh language and the Protestant religion, and so on, are trusts for the benefit of the estate in some way or other; and therefore, I suppose, the possession is in that abstraction, the estate. The beneficial possession is not in the trustees. The lady in question is clearly entitled, if she chooses, to go and reside in any of these houses. It is a matter for her election. She is not bound to go and reside there, but if she so elects and desires the trustees have no alternative but to let her reside there. It seems to me that the powers conferred upon the trustees come to nothing more than very extensive powers of management, and powers given for the purpose of enhancing the enjoyment of the estate, because that enjoyment is to be under prescribed conditions which the testatrix considers best for the mind and body of the person who is going to occupy the houses. When looked at in that point of view they do not in the slightest degree militate against the position of the tenant for life as having beneficial possession; on the contrary, they enhance the beneficial character of that possession.

It seems to me, therefore, that under the terms of this will this lady is "the person who is beneficially entitled to possession of the settled land for her life," within the statute.

Under these circumstances I think the decision of the learned judge was right, and this appeal must be dismissed.

ROMER L.J. I am of the same opinion. Putting it quite shortly, the scheme of the will, so far as concerns the houses and grounds the subject of this appeal, is as follows. There are, no doubt, very elaborate provisions made for the trustees keeping in a fit state for residence the premises in question,

including the employment of servants for that purpose. But the provisions as to servants are, after all, only part of the scheme of the will for keeping up the premises in a fit state to be resided in. Then come the provisions of the will which state who are to enjoy the premises as residences so kept up. The first trust is as to the person who is to enjoy the premises as residences: the trust is that the trustees "shall permit" Mrs. Herbert "at any time and from time to time during her life to reside at" those residences. Now that clearly is compulsory on the trustees. It is not discretionary on their part whether they shall allow her to reside, or to select any time for her residence. It is in fact and in substance a trust that she shall have the actual right to reside there during her life. The trust cannot really be construed otherwise; that is the object and intent of it: it cannot be construed as a mere power. Nor can this trust be construed as a trust that she alone individually should be allowed to go there from time to time and stay. That is not, to my mind, the meaning of this trust. I think it cannot be contended, and indeed it has not been contended, on behalf of the appellants that the meaning of this trust is to be cut down so as to say that this lady can only go there alone or individually as a sort of guest or lodger. The intention is that she shall be the person actually residing at these premises during her life—that she shall have the ordinary powers of a mistress over her own residence. She is to employ her own servants; she may have her own lady's-maid, her cook, and her housemaid, and she may manage the household. She is to have the ordinary rights, in fact, of a mistress in her own residence during her life: she may have her own friends, and if she is temporarily away, it cannot be contended that under this trust she will not have a perfect right to leave her servants in the house whilst she is away. In short, the trust is in substance to permit Mrs. Herbert during her life to use these premises as a residence.

That being so, she is, to my mind, within the words of s. 2, sub-s. 5, of the Settled Land Act of 1882, a person who is "beneficially entitled to possession" of these premises. If not, there is nobody, according to the contention of the

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appellants, who is beneficially entitled to possession. It cannot be said that the trustees are beneficially entitled to possession. Certainly the servants who are employed in these residences for the purpose of keeping them in a fit state cannot be said to be beneficially entitled to possession. Is it the fact, then, that during Mrs. Herbert's life there is nobody who is beneficially entitled to possession? I think not. I think that there is one person, and only one person, who during Mrs. Herbert's life is entitled to the beneficial possession of these premises, and that is Mrs. Herbert herself. To my mind, the lady is tenant for life really, and, if so, she is within the Act; and, in my opinion, the policy of the law is to regard the provisions of the Settled Land Acts as being beneficial, and not to cut down the class of persons, or the number of persons, coming within the definition of "tenant for life." No doubt the testatrix did not anticipate the effect of the Act, and it may be the provisions of the will interfere to a considerable extent with what may have been the real objects of the testatrix—as to which, however, I do not say anything. All I can say is that, whether that be so or not, it cannot be held to control the effect of the Act; nor do I know that it is for this Court, under the circumstances, to correct or to regret in any way the effect of the Act. I think, therefore, that the appeal should be dismissed.

COZENS-HARDY L.J. I am of the same opinion, and have very little to add.

It seems impossible to doubt that Mrs. Herbert is, and that no other person or persons can be, during her life entitled to the possession of these houses, if she does not disclaim the rights given to her by the will. All the powers of management, extensive and peculiar as they are, are not inconsistent with that right of possession. They in no way alter the effect which we ought to give to the Settled Land Act. In this point of view I should like to refer to clause 7 of the will—the clause that deals with heirlooms. It says this: [His Lordship read the clause, and continued:—] Can it be seriously contended that Mrs. Herbert is not entitled to these

heirlooms in the character of a person who is entitled to the residences? It seems to me that that, if necessary, assists the conclusion at which I should have arrived apart from clause 7.

With regard to the order of the learned judge, it seems to me to have been drawn up not quite in the right form. It should be altered by simply declaring that Mrs. Herbert is tenant for life.

[Their Lordships accordingly made an order as follows: "Vary the order of the Court below by declaring that the plaintiff, Mrs. Herbert, is tenant for life of the three mansion-houses within the meaning of the Settled Land Acts. Dismiss appeal. Appellants to pay respondent's costs, without prejudice to the question from what source they are to be defrayed."]

Solicitors: *Freshfields; Hunter & Haynes.*

G. I. F. C.

C. A.
1903
April 2, 6.

MONTEFIORE *v.* GUEDALLA.

[1858 M. 165.]

Equitable Assignment—Priority—Trust Fund—Fund in Court—Notice—Stop Order.

Upon the marriage in Morocco in 1865 of a Jewish husband and wife (the husband being domiciled in that country), a document called a "ketubah" was executed, under which it was alleged that the children of the marriage took an interest in the property of the wife. By the will of an English testator, who died in 1858, a sum of 10,000*l.* Consols was bequeathed to trustees, upon trust for the wife's mother for her life, with remainders to her children in equal shares. At the time of the marriage the wife was, subject to her mother's life estate, entitled to one-fourth of the fund. The fund was in court in a suit to administer the testator's estate, and stood to the separate account of the mother and her family. In 1878 the wife died intestate, and the husband took out administration in England to her estate. He in 1885, as her administrator, assigned her share of the fund for value to a reversionary society, and they obtained a stop order upon that share of the fund. The society had no notice of the "ketubah," and no notice had been given to the trustees of the will, and no stop order had been obtained on behalf of the persons entitled under it. In 1898 the tenant for life died.

Upon a petition in the suit by the society for payment of one-fourth of the fund to them:—

Held, that, the husband having the legal title to dispose of his wife's interest in the fund, the society had by means of the stop order obtained priority, and that the wife's share of the fund must be paid out to them.

In re Freshfield's Trust, (1879) 11 Ch. D. 198, approved and followed.

Decision of Byrne J. reversed upon a ground not taken before him.

APPEAL from a decision of Byrne J.

The suit was instituted in 1858 for the administration of the estate of Judah Guedalla, who died June 8, 1858.

By his will, dated December 21, 1839, he (inter alia) bequeathed to his executors the sum of 10,000*l.* 3 per cent. Consols, upon trust for his niece Mesodah Guedalla during her life, for her separate use without power of anticipation, and after her decease the testator directed that the trustees should stand possessed of the 10,000*l.* Consols "In trust for all and every the children and child of my said niece, by any man of the Jewish religion with whom she may intermarry, who being a son or sons shall attain the age or respective ages of twenty-one years, or who being a daughter or daughters shall attain the age or respective ages of twenty-one years or shall

respectively marry under that age with the consent of her or their parent or parents, guardian or guardians, to be signified by some writing under his, her, or their hand or hands, and to be paid and transferred to and divided between or amongst such children, if more than one, in equal shares as tenants in common, and their executors, administrators and assigns, on or at the same days and times respectively if the same respectively shall happen after the decease of my said niece, but if the same shall happen in her lifetime then immediately after her decease."

In August, 1842, Mesodah Guedalla was married to Samuel Serfaty, a man of the Jewish religion. He died on February 16, 1879, and she never married again. There was issue of that marriage five children, the youngest of whom, a daughter, was born in 1860 and died in 1868. The eldest child, a daughter named Miriam Serfaty, was born on October 9, 1845. On January 4, 1865, she was, with the consent of her parents, married to Eliahou Altaras, a Jew, who resided at Mogador, in Morocco, and was domiciled there. On the occasion of this marriage a "ketubah," "ketoobah," or "ketubbah" (that is, a Jewish marriage contract) (1), was entered into. There were three children of that marriage, one of whom died in 1878, an infant. The other two were still living. Miriam Altaras died on July 21, 1878, intestate, and on February 21, 1883, letters of administration to her estate were granted to her husband by the Principal Registry of the Probate Division.

On December 18, 1858, the usual administration decree was made in this suit, and under it the sum of 10,000*l.* Consols was transferred into court, and was carried over to the separate account of "The testator's niece Mesodah Serfaty and her family, subject to duty," and it was ordered that the dividends on that sum should be paid as they should accrue due to her until further order.

(1) We are informed by a specially competent learned friend that the word is properly *ketūbāh*, and the Spanish pronunciation current in Morocco accords with this. A form "ketuhbah," which occurred in some of the documents, is impossible; it may be a mistake for "ketubbah," representing the German-Hebrew pronunciation. Grammatically the word might mean a writing of any kind, but in fact it means only a marriage contract.—F. P.

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By a deed dated December 30, 1882, Eliahou Altaras assigned to the Reversionary Interest Society his undivided fourth part or share of and in the said sum of 10,000*l.* Consols expectant on the decease of Mesodah Serfaty, by way of mortgage to secure the repayment with interest of the sum of 1000*l.* advanced by the society to him. This deed contained a recital that administration to the estate of his deceased wife had been granted to Eliahou Altaras, but the completion of the mortgage and the advance of the money was delayed until after the administration had been actually granted on February 21, 1883.

On March 6, 1883, upon the application of the society, an order was made in the suit "that no part of the share of the said Eliahou Altaras of and in 10,000*l.* Consolidated 3 per cent. Annuities in court to the credit of *Montefiore* v. *Guedalla*, 'The separate account of the testator's niece Mesodah Serfaty and her family, subject to duty,' be sold, transferred, or otherwise dealt with without notice to the Reversionary Interest Society."

By another deed dated September 16, 1885, Eliahou Altaras in consideration of the sum of 1335*l.* (out of which the Reversionary Society were to retain the sum of 1000*l.* due to them upon the mortgage), absolutely assigned and released unto the society, freed from all right and equity of redemption, all his undivided fourth part or share of and in the said sum of 10,000*l.* Consols, "to which fourth part or share the vendor is now absolutely and indefeasibly entitled (subject to the mortgage) in remainder expectant on the death of the said Mesodah Serfaty."

On October 20, 1885, on the application of the society, an order was made in the suit that "no part of the 10,000*l.* Consolidated 3 per cent. Annuities in court to the credit of *Montefiore* v. *Guedalla*, 'The separate account of the testator's niece Miriam Serfaty and her family, subject to duty,' to which Eliahou Altaras is or may be entitled, or any part thereof, be transferred, sold, or otherwise dealt with without notice to the Reversionary Interest Society."

No notice of the "ketubah" had been given to the trustees of the will of Judah Guedalla, and no stop order had been obtained on behalf of the persons entitled under that instrument. The society had no notice of the "ketubah."

On October 10, 1889, Eliahou Altaras died. On September 19, 1898, Mesodah Serfaty (the tenant for life under the will of Judah Guedalla) died.

A petition was presented in the suit by the Reversionary Interest Society, asking that the two stop orders of March 6, 1883, and October 20, 1885, might be discharged; that the sum of 10,191*l.* 1*s.* 7*d.* New Consols in court (which represented the 10,000*l.* Consols) might be sold, and that, after payment of duty and costs out of the proceeds of sale, one-fourth of the residue might be paid to the society, and the other three-fourths to the persons respectively entitled thereto.

Upon the hearing of the petition evidence was adduced from Jewish Rabbis and others as to the effect of the "ketubah."

It was admitted, as Byrne J. said, that the law governing the destination of the interest which Miriam Altaras took under the testator's will was the law of Morocco, and it was not disputed that by that law the rights of Jews domiciled in Mogador as to marriage, as to rights arising under marriage contracts, and as to inheritance, were regulated in accordance with the Mosaic law as determined by the Jewish tribunal, i.e., the Chief Rabbis there.

Upon the evidence Byrne J. came to the conclusion that the "ketubah" was a settlement of the wife's property operating just as an English settlement, paramount to the title of the administrator, and that the husband took no interest in the property.

A declaration was accordingly made that the society had no title to or interest in the fund in court.

The society appealed.

Levett, K.C., *Alexander, K.C.*, and *W. S. Eastwood*, for the society. (1.) It is submitted that the society are entitled to Mrs. Altaras's one-fourth, by virtue of the assignment to them by her husband as her administrator, perfected by the stop order. The case is covered by *In re Freshfield's Trust* (1), which extended the principle of *Dearle* v. *Hall*. (2) This property is in the nature of a debt due to the society, and as the fund is in

(1) 11 Ch. D. 198.

(2) (1828) 3 Russ. 1; 27 R. R. 1.

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England the title to it must be regulated by English law: *In re Maudslay, Sons and Field* (1); Dicey's Conflict of Laws, r. 141, p. 533. The society properly took their title from the administrator: *Corser* v. *Cartwright* (2); *In re Venn and Furze's Contract.* (3) The fund is in an English court, and the society have a good title to it according to English law from the administrator of the person beneficially entitled to it, so that they have a perfect title.

For the purpose of administration the fund must be governed by the law of the locality in which it is, and not by the law of the domicil of the deceased owner: *Blackwood* v. *Reg.* (4) But it is contended that Mrs. Altaras was in fact domiciled in England at the time of her death.

[This point as to the effect of the stop order was not raised before Byrne J.]

(2.) As to the effect of the "ketubah," it cannot, according to the evidence, be regarded as a settlement; and even if it can be so regarded, then the society get the property under it, their assignor having survived his wife.

[COLLINS M.R. Before you deal with your second point, we wish to hear the argument for the respondents on the first point.]

Rowden, K.C., and *L. F. Potts*, for the surviving children of Mrs. Altaras. *In re Freshfield's Trust* (5) is distinguishable from the present case.

(1.) The "ketubah" had not the effect of an assignment by the wife of her interest in the fund; it was only an adoption of the Hebrew local law, and by that law the status of the parties was altered by the marriage, and the children of the marriage, though then unborn, acquired rights in their mother's property. A stop order is no doubt equivalent to notice to the trustees of the fund, but there was no one who could on behalf of the children give notice or apply for a stop order. To hold that by reason of the stop order obtained by the society they have gained priority would be an extension of the prin-

(1) [1900] 1 Ch. 602.
(2) (1875) L. R. 7 H. L. 731.
(3) [1894] 2 Ch. 101.
(4) (1882) 8 App. Cas. 82.
(5) 11 Ch. D. 198.

ciple of *In re Freshfield's Trust* (1) and *Dearle* v. *Hall*. (2) That principle ought not to be extended, for it often works injustice, as was said by Lord Macnaghten in *Ward* v. *Duncombe*. (3) *In re Freshfield's Trust* (1) is not binding on this Court. In *Clarke* v. *Woodward* (4) the Court declined to pay over a fund to the assignee of a husband who was his wife's administrator, the assignee having obtained a stop order and there being no other stop order, unless on proof that there were no children of the marriage, it having been found impossible to obtain an affidavit of no settlement on the marriage. The administrator himself could not by means of a stop order have obtained priority: why should his assignee be able to do so? It is submitted that a person who has himself no title to a fund cannot confer a title on a third person who obtains a stop order. After an assignment of a fund has been made, the only thing which remains in the assignor is the power to commit a fraud by assigning the fund to another person who has no notice of the first assignment. That power cannot pass to a legal personal representative. Moreover, here the first stop order does not purport to affect any interest but that of the husband, and he had no interest.

(2.) The stop orders can give no title to the society if they had notice of the rights of the children. The society before they obtained their stop orders had notice of the marriage of Mr. and Mrs. Altaras, and that it had taken place according to the Jewish law in Morocco. This was notice of the rights of the parties and their children according to that law. At any rate, the society were put on inquiry as to the law of the domicil of the husband and wife. By s. 3, sub-s. 1 (*a*), of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), the society are affected with notice, for the effect of the foreign law would have come to their knowledge if they had made such inquiries as they ought reasonably to have made: *Bailey* v. *Barnes*. (5)

COLLINS M.R. Curiously enough, the particular point upon which we are asked to give judgment was not taken in

(1) 11 Ch. D. 198.
(2) 3 Russ. 1; 27 R. R. 1.
(3) [1893] A. C. 369, 392–4.
(4) (1858) 25 Beav. 455.
(5) [1894] 1 Ch. 25.

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the Court below. [His Lordship stated the facts, and continued:—]

The fund is in court, and it has always been and is now vested in the trustees of the will. We have, therefore, the wife's administrator—her legal personal representative—assigning for value this fund, and his assignees perfecting their title, so far as it is possible to perfect it, by putting a stop order on the fund. It is said now (but this point was not taken before Byrne J.) that that perfected assignment in itself gives an absolute right to the society against all intervening and unperfected assignments (if such there were) made by the deceased lady in her lifetime. It is said on the other hand that this ultimate and completed assignment is overriden by the "ketubah," which has been called, whether rightly or not I do not know, a marriage settlement. I will assume for the present purpose that the "ketubah" was such a settlement as to constitute an assignment by the wife of her reversionary interest in the Consols. That was the ground of the decision of the learned judge, though for the reasons which I am about to state I think it is not necessary for us to express any opinion on that part of the case. I shall assume, therefore, that the "ketubah" operated as a good equitable assignment of the wife's reversionary interest after the death of her mother. No steps were, however, taken to perfect that title either by the lady herself or by her husband, or by both of them together; the result being that, so far as the trustees of the will were concerned, they were and appeared to the world to be the only persons legally entitled to the fund, and she appeared to be the only person beneficially entitled to it. In that state of things the transaction which I have described took place—her legal personal representative assigned the fund for value. The question now arises whether under these circumstances the purchasers take priority over any intervening assignment not completed by notice to the trustees. As it seems to me, the point is really covered—indeed this was hardly disputed—by the decision of Jessel M.R. in *In re Freshfield's Trust.* (1) The head-note to that case is as follows: "Upon the principle

(1) 11 Ch. D. 198.

in *Dearle* v. *Hall* (1), the right to priority which a second assignee of an equitable interest in a fund, who has given notice of his assignment to the trustees, possesses over a first assignee who has failed to give notice, subsists equally where the second assignee has taken his assignment from the legal personal representative of the cestui que trust, and not from the cestui que trust himself." That is precisely what has happened in the present case; and if *In re Freshfield's Trust* (2) cannot be distinguished, it is conclusive of the present case, unless we overrule it. Two grounds have been suggested as shewing that that authority does not apply here. In the first place Mr. Rowden has contended that the marriage in Mogador had by law, apart from any contract between the parties or anything in the nature of an assignment, the effect of altering the relation of the parties as to the wife's reversionary interest and depriving the husband of any possible interest therein. Mr. Rowden says that by the operation of the Jewish law the mere alteration of the status of the parties produces that effect, and that therefore it cannot be treated as in any sense the case of an assignment which required perfecting in order to give it priority over the subsequent assignment to a purchaser for value. In my opinion that contention cannot prevail, because besides the Jewish marriage there was the contract of the parties which is described on the face of the instrument. Certain funds are bestowed on the wife, and certain funds are bestowed on the husband by the contract of the parties outside the inherent operation of the marriage rite in altering the status of the parties. I am assuming, therefore, everything that can be assumed in Mr. Rowden's favour on that part of the case when I assume that the marriage involved an assignment divesting the wife of her interest in the fund.

Then it is said that *In re Freshfield's Trust* (2) is not an authority which we ought to follow; that, if it cannot be distinguished, it is an extension of the doctrine of *Dearle* v. *Hall* (1), the leading authority on the point, the principle of which it purported to apply. And some dicta of Lord Macnaghten in

(1) 3 Russ. 1; 27 R. R. 1. (2) 11 Ch. D. 198.

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Ward v. *Duncombe* (1) have been cited to shew that the principle of *Dearle* v. *Hall* (2) ought not to be extended. However that may be, it seems to me that *In re Freshfield's Trust* (3) is not really an extension of the principle of *Dearle* v. *Hall*. (2) It is merely an application of that principle to a particular instance which had not come up for discussion before. It seems to me that this is so for the reasons given by Jessel M.R. himself, which I think are unanswerable. In the course of his judgment (4) he read the following passage from the judgment of Plumer M.R. in *Dearle* v. *Hall* (2): "By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the cestui que trust is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance, and that the trustees are still trustees for him, and for no one else. That precaution is always taken by diligent purchasers and incumbrancers: if it is not taken, there is neglect; and it is fit that it should be understood, that the solicitor, who conducts the business for the party advancing the money, is responsible for that neglect. The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having taken place in the equitable rights affecting it: he considers himself to be a trustee for the same individual as before, and no other person is known to him as his cestui que trust. The original cestui que trust, though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever; so that he has it in his power to obtain, by means of it, a false and delusive credit."

It seems to me that every word of that applies, and in a sense applies a fortiori to an administrator who by the mandate of the law has the right to say to every one, "I am the person entitled to dispose of the estate of the deceased." The law

(1) [1893] A. C. 369, 392–4.
(2) 3 Russ. 1, 12; 27 R. R. 1.
(3) 11 Ch. D. 198.
(4) Ibid. 201.

has clothed him with that ostensible authority; he represents the deceased, and is empowered by law to dispose of everything of which the deceased had a right to dispose.

Then it is said that under the circumstances there is merely transferred to him the right to commit a fraud. But the lady herself had precisely the same right, and it is not disputed that, if she herself while living had made the assignment to a person who perfected it by notice to the trustees, that person would have taken a complete title to the fund, notwithstanding the fact that she had by a previous equitable assignment divested herself of the right to make the assignment to him. In my opinion, there is no distinction in point of law, and the reasoning of the Master of the Rolls is unanswerable. The legal representative was clothed by law with the ostensible authority to deal with everything which the lady herself could have dealt with, and he has purported to deal with a fund standing in the name of trustees in this country, with no notice of any clog affecting it, and the purchaser has in the most formal possible way given them notice of the assignment to him by obtaining a stop order.

Then it is said that the society ought to have made further inquiries, and that if they had done so they would have discovered the previous dealing with the fund. It seems to me that when they insisted, as they did, on proof of the marriage, of the death of the wife, and of the letters of administration, they did all which they could be fairly called upon to do. They got evidence of all those facts, and they acted upon that upon which, I think, they were bound to act, and upon which they were certainly justified in acting, namely, the authority of the Court, declaring that the administrator was the person entitled to deal with the estate of the deceased.

Upon this point, therefore, which was not argued before the learned judge, and on which he has expressed no opinion, I think the appeal must be allowed.

ROMER L.J. I am of the same opinion. The position of affairs shortly stated is this. There is a fund in court in this country; to that fund a lady domiciled and married in Mogador

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is entitled; she dies; letters of administration to her estate in this country are taken out by her husband, and he as administrator assigns the fund to the petitioners for value. At the date of the assignment there was no stop order upon the fund. If inquiry had been made in this country whether the fund had been incumbered or dealt with in any way, the answer to that inquiry would have been, "No, it has not." So far, therefore, as appeared, the administrator had full title to assign the fund as unincumbered and undealt with, and his assignees by putting a stop order on the fund, as they did, obtained a perfect title.

But it is said, in the first place, that, inasmuch as the society had notice of the fact that the lady was domiciled and married in Mogador, this put them on inquiry, and affected them with notice of any rights which might have been conferred upon third persons by reason of the marriage. And it is said that according to the Jewish law affecting the husband and wife on their marriage in Mogador, or by reason of a document called a "ketubah," which was executed on the marriage, the wife on her death had no interest remaining in the fund in question, so that no interest in it passed to her administrator, and he could not assign the fund to the society. It is said further that the society must be taken to have had notice of this position of things, merely because they had notice of the fact of the marriage and of the domicil of the parties in Mogador. In my opinion no such knowledge can be imputed to the society. To affect the society with notice so as to bind their rights there must be notice to them of something which deprived the administrator of the power to dispose of the fund in court, and in my opinion they had no such notice. So far as they were concerned they had a right to assume that the person who legally had the right to deal with the fund, and by legally I mean by virtue of his being administrator to his wife, could pass a perfect title to the fund, so far as a perfect title could be given to property of this kind. No notice, therefore, can be imputed to the society. If the respondents base their case on shewing that by reason of the marriage a title to the fund accrued on the death of the wife to some other

persons, namely, her children, that will not assist the respondents, seeing that notice of those rights had not been given to the society. The legal personal representative of the original owner of a fund in this country is by law entitled to deal with the fund, without regard to the rights of third parties not known in this country and not protected by a stop order. If the right of the respondents is based on the "ketubah," they claiming under it as assignees of the wife, still, seeing that the society had no notice of that assignment, their title to the fund cannot be impugned. The fund remained, as I have already pointed out, apparently the property of the wife till her death, and on her death it became apparently the property of her administrator. In my opinion any person dealing with the apparent owner of a fund of this kind, who on inquiry finds no stop order upon the fund, is entitled to assume that the apparent owner has not already dealt with the fund, and this applies to both the wife and her legal personal representative. If no stop order appears on a fund such as this, or if in the case of an assignment of a debt no notice is given to the debtor, a person who takes an assignment of the fund or the debt, whether from the original owner or creditor or from his legal personal representative, is entitled to assume, if on inquiry he finds that no stop order has been obtained or no notice has been given, that no dealing has taken place affecting the fund or the debt by the original owner or creditor, or by his legal personal representative after his death. On this ground and for the reasons so forcibly stated in the judgment of Jessel M.R. I think that *In re Freshfield's Trust* (1) was rightly decided. In my opinion the principle of that decision governs the present case, and on that ground this appeal must succeed. I may repeat what the Master of the Rolls has already pointed out, that in so deciding we are not expressing any disapproval of the decision of the learned judge below, inasmuch as this point was not brought to his attention.

COZENS-HARDY L.J. I am of the same opinion and for the same reasons. The rule laid down in *Dearle* v. *Hall* (2) is

(1) 11 Ch. D. 198. (2) 3 Russ. 1; 27 R. R. 1.

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now part of the law of the land. It does not rest merely upon the decisions of Sir Thomas Plumer and Lord Lyndhurst in that case. It was affirmed and possibly extended by the House of Lords in *Foster* v. *Cockerell.* (1) The reasoning of Jessel M.R. in *In re Freshfield's Trust* (2) has satisfied me that the principle applies equally when the second assignment is made, not by the original owner who made the first assignment, but by his legal personal representative. That decision is nearly a quarter of a century old. It has never been questioned, and, as it now comes to be considered in the Court of Appeal, I think it right that we should say we approve of it.

That being so, the only point left is that which was very forcibly urged upon us by Mr. Rowden, namely, that this cannot be treated as the case of an assignment of a fund by the equitable owner, followed by another assignment by his legal personal representative, the second assignment being perfected by a stop order. Different considerations, it is said, arise when the rights of the respondents come into existence simply by reason of the change of status resulting from the marriage in Mogador. I am unable to follow that argument. Such rights as the respondents have spring out of the contract of marriage between the husband and wife, who were married in Mogador. Those rights spring out of the contract of marriage plus the "ketubah," which contains terms beyond those which would have been involved in the mere contract of marriage itself. In whichever way you look at it, it seems to me that this is really a case of two assignments, and the principle of *Dearle* v. *Hall* (3) as explained by Jessel M.R. in *In re Freshfield's Trust* (2) must apply, whether you regard the rights of the respondents as depending upon a change of status, or, as I prefer to put it, upon the contract of marriage and the "ketubah."

Then it was urged that the doctrine of *Dearle* v. *Hall* (3) would not apply if the society had notice before they acquired their own title. Of course it would not. But when one asks

(1) (1835) 3 Cl. & F. 456; 39 R. R. 24. (2) 11 Ch. D. 198.
(3) 3 Russ. 1; 27 R. R. 1.

what ground there is for imputing to them a notice which in truth they had not, I think it is impossible to come to the conclusion that they are affected by notice. They had proof of the fact of the marriage, proof of the death of the wife, and proof that their assignor was the person, and the only person, recognised by the law of England as having the legal title to deal with this fund. It would be dangerous in the last degree to hold that the mere fact of knowledge of a marriage in a foreign country affects the person who has that knowledge with notice of all the foreign law applicable to persons who marry in that country. The point on which we are basing our decision was not taken before Byrne J., and, as has been said by my learned brethren, we are not really differing from that learned judge.

Solicitors: *Radcliffe, Cator & Hood; Cunliffes & Davenport, for Darbishire, Tatham, Worthington & Co., Manchester.*

W. L. C.

C. A.
1902
BUCKLEY J.
July 9.
C. A.
1903
Feb. 18, 19; *March* 19.

In re BISS.
BISS *v.* BISS.

[1901 B. 1898.]

Lease—Lessee, Death of—Intestacy—Next of Kin—Infant—Tenants in Common—New Lease—Renewal by one Tenant in Common—Partial Interest in old Lease—Accretion to Intestate's Estate—Renewal for Benefit of Estate—Fiduciary Relation—Trustee—Constructive Trust—Practice—Costs—Taxation—Counsel's Fees—Judgment, Attending to hear—Practice Notes on Taxation, 1902.

There is no authority for the general proposition that if a person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease. A person renewing is only held to be a constructive trustee of the new lease if, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested: as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a partnership lease, or by a mortgagee of a mortgaged lease. In all such cases the new lease is treated as engrafted on or as forming part of the original lease.

A lessor granted a lease for seven years of a house in which the lessee carried on a profitable business. On the expiration of the term the lessor refused to renew, but allowed the lessee to remain as tenant from year to year at an increased rent. During that tenancy the lessee died intestate, leaving a widow and three children, one being an infant. The widow took out administration to her husband's estate, and she and the two adult children, one of whom was a son, continued to carry on the business under the existing yearly tenancy. The widow and son each applied to the lessor for a new lease for the benefit of the estate, which he refused to grant, but, having determined the yearly tenancy by notice, he granted to the son "personally" a new lease for three years at a still further increased rent.

In an action which had in the meantime been instituted by the three children, including the infant, against the administratrix for administration of the intestate's estate, the administratrix applied to have the new lease treated as having been taken by the son for the benefit of the estate, and for an account of the rents and profits received by him:—

Held, by Buckley J., on the authority of *Ex parte Grace*, (1799) 1 Bos. & P. 376, that the son was a trustee of the new lease for the benefit of the estate, and an account was directed accordingly:

But *held*, by the Court of Appeal, that the evidence took the case out of *Ex parte Grace* in that it shewed that the right or hope of renewal had been determined by the lessor himself before the son intervened, so that

the new lease could not be treated as an accretion to the estate of the deceased, and also that the son had in no way abused his position nor stood in any fiduciary relation towards nor owed any duty to the other persons interested in the estate; and that he was therefore entitled to retain the lease for his own benefit.

Dictum of Lord Bathurst L.C. in *Rawe* v. *Chichester*, (1773) Amb. 715, 719, considered.

Ex parte Grace distinguished.

Palmer v. *Young*, (1684), incorrectly reported in 1 Vern. 276, considered: see the full report, infra, p. 65 (note).

A separate fee to counsel for attending to hear judgment will not be allowed when judgment is given in the same sittings in which the case was heard: see Practice Notes on Taxation of Costs, issued from the Taxing Office, 1902.

In 1887 one Stone, the lessee of a house No. 26, Litchfield Street, Westminster, granted to John Biss an underlease of the house for seven years from March 25, 1887, at the yearly rent of 80*l*. Biss then proceeded to carry on upon the premises the business of a common lodging-house keeper, which proved very profitable.

On the expiration of that underlease Biss applied to Stone for a renewal; this, however, Stone refused to grant, but Biss continued in possession as yearly tenant to Stone at an increased rent of 84*l*., carrying on the business as before.

On September 28, 1900, while in possession as such yearly tenant, Biss died intestate, leaving surviving him his widow and three children, two by his first wife, being a son, John Edwin Biss, and a daughter, both of whom were of age, and one, an infant daughter, by a second wife, who survived him.

On February 20, 1901, letters of administration were granted to the widow, who, together with the son and eldest daughter, continued to carry on the business under the existing yearly tenancy, and she then opened negotiations with Stone for a new underlease of the house, as Stone said in evidence, on her own behalf, but, as she stated in her evidence, on behalf of the intestate's estate. Stone, however, positively refused to grant her a new term, and made the same reply to a communication from her solicitor. Subsequently an administration action was commenced by the three children, as next of kin of the intestate—the infant plaintiff appearing by the plaintiff J. E.

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Biss as her next friend—against the widow and administratrix, and in May, 1901, an order was made in the action appointing a receiver.

As the head-lease under which Stone held the premises would expire on March 25, 1902, Stone, on September 23, 1901, served the receiver with a notice to quit on March 25, 1902. The plaintiff J. E. Biss having heard of that notice, and the business carried on upon the premises being a profitable one, obtained an introduction to Stone, and in February, 1902, called upon him to ascertain whether he would grant a new lease for the benefit of the estate, but this Stone declined to do, saying that he had already refused to grant a lease to the defendant, the administratrix, and that he had no intention of granting a lease to any one representing the estate of John Biss. In the following month, March, 1902, the plaintiff J. E. Biss again called on Stone, who informed him that he had decided to take a new lease of the premises and offered to let them to him, the plaintiff, "personally," saying he was aware that the plaintiff had assisted his father in the business and was desirous of helping him, for his father's sake, to obtain a livelihood, whereupon the plaintiff, after discussing with Stone the terms on which the premises were to be let, accepted the offer.

In the meantime the receiver, having apparently learnt that there was a probability of Stone's taking a new head-lease of the premises, applied to him, at the request and on behalf of the defendant, the widow, to grant her a new sub-lease, and on March 17, 1902, Stone replied as follows: "With regard to your inquiry as to renewal of the above premises, I beg to inform you that I positively decline any negotiations for renewal either to Mrs. Biss or to any one representing the estate of the late Mr. John Biss. I have already rejected Mrs. Biss' application in this connection, and if I let the premises again it will be for the express purpose of offering it to Mr. J. E. Biss, junior, as a matter of respect for him and his late father; but this, of course, is entirely a matter between Mr. J. E. Biss, junior, and myself."

Eventually Stone took a new lease of the premises, and then

by an agreement in writing dated March 24, 1902, agreed to underlet them to the plaintiff J. E. Biss for three years from March 25, 1902, at the further increased yearly rent of 95*l.*

On April 30, 1902, the defendant, the widow, took out a summons that the plaintiff J. E. Biss might be ordered to hand over the agreement to the receiver, and that an account might be taken of the rents and profits of the premises from March 25, 1902 (when the tenancy that formed part of the intestate's outstanding personal estate expired), come to the hands of the plaintiff J. E. Biss, or any other person by his order or for his use, and that he should pay the balance found due on such account to the receiver, and that the receiver should, until further order, collect and get in the rents and profits of the premises as part of the intestate's estate.

G. I. F. C.

The summons was heard by Buckley J. on July 9, 1902.

J. G. Wood, for the defendant, cited *Palmer* v. *Young* (1); *Keech* v. *Sandford* (2); *Kennedy* v. *De Trafford* (3); *In re Lord Ranelagh's Will* (4); *Ex parte Grace.* (5)

[Buckley J. referred to Lewin on Trusts, 10th ed. pp. 193, 194, and *James* v. *Dean.* (6)]

Ashton Cross, for J. E. Biss, referred to *Yem* v. *Edwards* (7), *Longton* v. *Wilsby* (8), and *Randall* v. *Russell.* (9)

Buckley J. (after stating the facts). I find myself overborne by authority. It is, of course, very familiar law that if a trustee obtains a renewal of a lease of property vested in him as trustee, whether by virtue of a right of renewal or not, he must hold the new lease for the benefit of his cestui que trust. The leading authority upon that is *Keech* v. *Sandford.* (2) The principle is that the trustee owes it to his cestui que trust to obtain a renewal, if he can do so, on beneficial terms, and that the

(1) 1 Vern. 276.
(2) (1726) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.
(3) [1897] A. C. 180.
(4) (1884) 26 Ch. D. 590.
(5) 1 Bos. & P. 376.
(6) (1805) 11 Ves. 383; (1808) 15 Ves. 236; 8 R. R. 178.
(7) (1857) 1 De G. & J. 598.
(8) (1897) 76 L. T. 770.
(9) (1817) 3 Mer. 190; 17 R. R. 56.

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Court will not allow him to obtain a renewal upon beneficial terms for himself when his duty is to get it for his cestui que trust.

Then there is another class of cases in which I conceive the law is equally plain, namely, where the testator or intestate was entitled to a leasehold property with a right of renewal. In such a case, in the consideration of this Court, that which passes upon his death, either by his will or by his intestacy, is the property with the benefit of the right of renewal; and any person who, by reason of that right, whether directly or indirectly, obtains a renewal must hold it for the benefit of the estate.

In the 10th edition of Lewin on Trusts, at p. 193, that last proposition, which I have been endeavouring to state myself, is expressed thus: "Upon the same principle"—that is to say, upon the same principle as that to be derived from the *Keech* v. *Sandford* (1) class of case—"if a person, possessing only a partial interest in a lease as a tenant for life," and so on, giving various instances of partial interests, "renew the term upon his own account, he shall hold for the benefit of all parties interested in the old lease; for in consideration of equity the subject of the settlement is not only the lease, but also the right of renewal; and no person taking only a limited interest can avail himself of the situation in which the settlement has placed him to obtain a disproportionate advantage in derogation of the right of others who have similar claims."

That paragraph is founded on cases cited in the foot-notes, in most of which there was a right of renewal; but in one of them certainly, namely, *Ex parte Grace* (2), there was no right of renewal.

Then, at p. 194, the learned author goes on to deal with another class of cases, establishing this proposition—that if there be a bequest to A. for life with remainder to B. of leaseholds having no right of renewal, and the testator was at the time of his death a mere yearly tenant, the lease having expired in his lifetime, yet if A., the tenant for life, renews the lease he must hold it on the limitations of the will, for this reason,

(1) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693. (2) 1 Bos. & P. 376.

that the yearly tenancy which the testator had was an interest which he could dispose of—"and the tenant for life could not, by acting on the goodwill that accompanied the possession, get the exclusive benefit of a more durable term," for which he cites *James* v. *Dean*. (1) That, again, is a principle which I understand, namely, that the tenant for life is a person between whom and the lessor there exists a relationship, and he must not use his position as tenant for life to obtain a renewal, and then say, "I have got that for myself."

The case with which I have to deal does not fall within any of those classes of cases. There was a mere yearly tenancy, with no right of renewal, and the lessor refused to renew to the administratrix. Between the lessor and John Edwin Biss there was, of course, no privity at all. It did not follow that John Edwin Biss would take any interest in the estate—the estate might have been insolvent. But the proposition which has been advanced by Mr. Wood for the applicant is, that if there be a person interested under the will or intestacy of a man who had a leasehold interest without a right of renewal, that person's interest being, it may be, very remote or contingent, nevertheless if such a person obtains a renewal he must hold it for the benefit of all persons interested under the will or intestacy. I have looked at cases and carefully considered the matter, and asked the assistance of counsel to enable me to ascertain upon what principle that should be so. The principle, I am told, is this, that the interest of the person so deriving title under the testator or intestate may be a thing which will assist him to obtain the renewal. If it does, then I understand the principle. But I am told that the proposition is larger—that it does not matter whether when he gets his renewal his lessor knows that he is interested or not, or whether it is his interest in the property which has assisted him to obtain the renewal, but that if in point of fact he is interested he must be a trustee for the persons entitled under the will or under the intestacy. In that I can see no principle. But while I am in a difficulty to find a principle, it appears to me that I must treat myself as bound by an authority to which I am going

(1) 11 Ves. 383; 15 Ves. 236; 8 R. R. 178.

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to refer which seems to me to govern the present case, even though I confess myself unable to see the exact principle on which it rests. The case is *Ex parte Grace.* (1) It is not, I think, very satisfactorily reported. Of course I must take the judgment in reference to the statement of facts, as shewing on what principle Eyre C.J. proceeded. A man died intestate, and his widow was his administratrix. I suppose I must take it that he was intestate although it is not stated in so many words. He was possessed of a beneficial lease under the trustees of a charity, and he died leaving a widow who became administratrix of his effects. Then this is stated: "By his death Mrs. Harrison"—that is the widow—"became entitled to the lease jointly with E. T. Harrison, her son by the deceased, and then an infant." I am in doubt what that means; but I suppose, having regard to what the Chief Justice presently says, that it means that under the intestacy she and the son took certain interests in the lease. "Soon afterwards Mrs. Harrison married W. Grace, who as her husband having taken possession of the above-mentioned lease and title-deeds, on the approaching expiration of the lease (and during the infancy of E. T. Harrison) treated with the trustees for a renewal of it to himself only, and in his own name; this he accordingly obtained. W. Grace having afterwards become a bankrupt, his assignees took possession of the lease and were proceeding to sell it for the benefit of the estate, when E. T. Harrison"—the infant, who had in the interval attained the age of twenty-one years—"claimed his proportion of the money arising from the sale of the lease," the assignees having sold. From the argument of counsel (although this is not mentioned in the statement of facts) it appears that there was no covenant for renewal in the original lease. The Chief Justice said this: "These arguments might have weight if it were now to be decided for the first time whether a person renewing a lease in which he is partly interested, and in which another person (that person being an infant) is also partly interested, shall or shall not be considered a trustee. The point has been decided at least forty times." That is the statement upon which the Chief Justice is pro-

(1) Bos. & P. 376, 377.

ceeding. He says nothing about the widow being administratrix; he only says she is "partly interested." One of the persons partly interested, or rather her husband, obtains a renewal, and another of them is an infant. That is exactly the present case. Here the widow was entitled to a third, and the three children were entitled each to their proportions of the remaining two-thirds—one of them was an infant—and John Edwin Biss was partly interested in this lease. The Chief Justice proceeds to say: "Grace took the lease at his own peril; if it had not turned out beneficial he must have sustained the loss, but as it is a beneficial lease it must be for the benefit of the trust. This is the peculiar privilege of the unprotected situation of an infant. In the present case it has clearly proved a beneficial lease, or this application would not have been made to the Court." He puts it, therefore, not on the fact that the widow was administratrix, but on the fact that a beneficiary was an infant.

I cannot distinguish that case from the present. There it is, and it appears to me that it governs the case before me.

Then it is said by Mr. Ashton Cross that Stirling J. decided *Longton* v. *Wilsby* (1) upon the footing that he was unable to find any case in which the doctrine of *Keech* v. *Sandford* (2) has been applied to leaseholds which were not renewable by contract or custom. That is true in this sense—that *Keech* v. *Sandford* (2) was a case of a trustee taking a renewal, and *Ex parte Grace* (3) is not a case of a trustee, but a person partly interested taking a renewal; but *Ex parte Grace* (3) was not cited in *Longton* v. *Wilsby* (1), and it appears to me that that is a case in which the doctrine of *Keech* v. *Sandford* (2) is extended beyond the case of a trustee to the case of a person partially interested, and has been applied to leaseholds which were not renewable by contract or custom. I therefore treat myself as bound by *Ex parte Grace*. (3) It is binding upon me, and I am bound to follow it.

Upon the evidence I find as a fact that the lessor intended to give this lease to the son adversely to the administratrix—in

(1) 76 L. T. 770.

(2) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.

(3) 1 Bos. & P. 376.

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other words, he refused to renew for the benefit of the estate and he meant to give the lease to the son for the son's benefit. Nevertheless according to *Ex parte Grace* (1), if I rightly understand it, the son stood in such a position as that between himself and the other persons partly interested, one of them being an infant, he must be treated as if he were a trustee for the estate.

[His Lordship then made an order declaring that the plaintiff J. E. Biss was a trustee of the premises for the term granted to him by the agreement of March 24, 1902, for the benefit of the estate of the intestate, and directing him to hand over the agreement to the receiver; also directing an account of rents and profits from March 25, 1902, and payment by the plaintiff J. E. Biss to the receiver of what should be certified to be due on such account.]

F. E.

From that order the plaintiff J. E. Biss appealed, asking that it might be declared that he was not a trustee of the premises for the benefit of the estate.

C A. The appeal was heard on February 18 and 19, 1903.

Astbury, K.C., and *Ashton Cross*, for the appellant, the plaintiff, J. E. Biss. There is no reason why the appellant should be held to be a trustee of the new lease for the benefit of his father's estate. The landlord had refused to grant a lease to the administratrix; the plaintiff was only one of the next of kin and not in a fiduciary position towards the estate; he did not get the new lease in consequence of his being in possession or entitled to the goodwill of the business; there was no right of renewal; and the new lease was not a beneficial lease, but a lease at a rack-rent. There is no fiduciary relationship between persons entitled as next of kin any more than between other tenants in common: *Kennedy* v. *De Trafford*. (2) The doctrine of *Keech* v. *Sandford* (the Rumford Market case) (3), that wherever a lease is renewed by a trustee it

(1) 1 Bos. & P. 376.
(2) [1897] A. C. 180, 186.
(3) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.

shall be for the benefit of the cestuis que trust, has never been applied to leaseholds not renewable by custom or contract: *Longton* v. *Wilsby* (1); and to come within that rule the person who obtains the lease must be in the position of a trustee. Buckley J. held that he was bound by the decision in *Ex parte Grace* (2); but we submit that it does not apply to this case. The lease there was a beneficial lease, and it was held by a person jointly entitled with, and as trustee for, an infant.

T. H. Carson, K.C., and *J. G. Wood*, for the defendant, the administratrix. *Ex parte Grace* (2) is directly in point: it has been followed and has never been criticized. It was decided on the ground of infancy, following *Keech* v. *Sandford* (3) and other cases, and there is an infant interested in this lease also. Here a yearly tenant died intestate, leaving a valuable goodwill of the business he was carrying on upon the premises. The landlord refused to give a lease to the widow; but that is immaterial; he gave one to the appellant on account of his relationship to the intestate, and because he had for years assisted his father in the business. If in taking the new lease the appellant was, as we contend he was, standing in a fiduciary relation towards the other persons interested in his father's estate, he must be regarded as holding the new lease for the benefit of his cestuis que trust, even though the landlord had refused to renew for them: *Fitzgibbon* v. *Scanlan*. (4) The intervention of the tenancy from year to year after the expiration of the old lease does not prevent the application of the doctrine: *James* v. *Dean*. (5) The question is whether the new lease is traceable to the common title, and whether it was granted to the appellant on account of the advantages which he possessed in respect of that title. The doctrine applies to persons who are not in a fiduciary position; for instance, between tenant for life and remainderman: *Dicconson* v. *Talbot*. (6) A legal right to a renewal is not necessary: if

(1) 76 L. T. 770.
(2) 1 Bos. & P. 376.
(3) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.
(4) (1813) 1 Dow, 261, 269; 14 R. R. 62.
(5) 11 Ves. 383; 8 R. R. 178.
(6) (1870) L. R. 6 Ch. 32.

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any "person interested" in the old lease obtains a renewal, it is subject to the same trusts as the old lease: *Rawe* v. *Chichester*. (1) It is sufficient to shew, as we have proved in this case, that the appellant had an introduction to the landlord, or that he was one of several tenants in common: *Pickering* v. *Vowles* (2); *Hamilton* v. *Denny* (3); *Jackson* v. *Welsh* (4); *Palmer* v. *Young*. (5) In this case there was a sort of tenant right, an expectation of renewal arising from the appellant's introduction to the landlord. Although there was no expressed partnership between the next of kin, they were in the position of partners, for the business was carried on by the family, including the appellant, after the father's death; and it was owing to his knowledge of the business that the appellant obtained the new lease.

The circumstance that the persons interested in the goodwill of the business were quasi-partners must be taken into consideration. A person jointly interested with others in a lease cannot take to himself the benefit of a renewal to the exclusion of the others: *Clegg* v. *Fishwick*. (6) As it is expressed in the old cases, there is "a tenant right arising out of the old lease." The doctrine applies not only where there is a right, but also where there is a probability of renewal. Although in general there is no fiduciary relation as between tenants in common, yet, if one of them obtains a renewal of a lease in which all of them have been interested, the Court will hold him to be a trustee of the renewed lease for all. So a tenant for life taking a renewal holds it as trustee for all parties interested under the settlement. In every such case the party obtaining the renewal holds it, as Buckley J. has said, "for the benefit of the estate." It is a fallacy to say that the doctrine applies by reason of some primary fiduciary relation between the parties. There need be no such fiduciary relation. There is no primary fiduciary relation between tenants in common, nor between tenant for life and remainderman, nor between mortgagor and mortgagee:

(1) Amb. 715, 719.
(2) (1783) 1 Bro. C. C. 197.
(3) (1809) 1 Ball & B. 199; 12 R. R. 14.
(4) (1836) Ll. & G. t. Plunket, 346.
(5) 1 Vern. 276. (See note at the end of this case.)
(6) (1849) 1 Mac. & G. 294, 298.

Warner v. *Jacob* (1) The doctrine is founded on the fact that the renewal is an accretion or accessio to the interest or property previously held. For instance, in *Rushworth's Case* (2) it was held that the mortgagee of a college lease, in renewing, did so for the benefit of the mortgagor, upon the ground that "the mortgagee doth but graft upon his stock, and it shall be for the mortgagor's benefit." That, we submit, is still the law. So here, the defendant claims as a beneficial owner of the "stock," and therefore the fruit of that stock belongs to her as well as to the other owners. Of two joint owners of the stock, one alone cannot have the fruit of it. *Holmes* v. *Williams* (a Forest of Dean case) (3) is an illustration shewing where the doctrine does not apply, for in that case there was no connection between the old "gale" and the renewed gale. The renewed gale was no accretion whatever to the old right, but was an entirely new right. In *In re Lord Ranelagh's Will* (4) the doctrine was applied to the purchase of the freehold reversion of a lease devised by will, the purchase being from the tenant for life; there it was held, for the first time, that there was a trust of the reversion for the persons interested in the lease. The decision in that and the other cases on the subject rests, not on the ground of a trustee abusing his trust, but on the ground of the common interest of the parties—whether taking together, as in the case of tenants in common, or taking in succession, as in the case of tenant for life and remaindermen—in an accretion to the property in which they are or have been interested. Such is the law even assuming all parties are sui juris; but it applies with still greater force where one of the parties interested is an infant, as in *Ex parte Grace* (5), already cited. For a person entering upon the estate of an infant is fixed with a fiduciary position towards the infant: *Quinton* v. *Frith*. (6) This, therefore, is a case in which, on the ground of infancy alone, the decision of Buckley J. should be affirmed.

Astbury, K.C., in reply. I admit that if there is in any sense

(1) (1882) 20 Ch. D. 220.
(2) (1676) Freem. 13.
(3) W. N. (1895) 116 (15).
(4) 26 Ch. D. 590, 597.
(5) 1 Bos. & P. 376.
(6) (1868) Ir. R. 2 Eq. 396.

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a fiduciary relation existing here, my case must fail; but my contention is that the plaintiff is not under any fiduciary relation whatever to the rest of the testator's next of kin.

[ROMER L.J. Observe what Lord Bathurst L.C. says in *Rawe* v. *Chichester* (1): "It may be laid down as a rule, that whoever has a lease has an interest in the renewal, and it is often the subject of settlements and of the jurisdiction of this Court; though the lessors are not bound to renew, yet, when done, it is a continuation of the old lease. If trustees, mortgagees, and persons interested, obtain renewal, the new lease is always subject to the trusts and limitations of the old lease." Then he cites authorities.]

But the authorities he cites, when examined, have really no bearing upon the point, for they deal with the case of a *trustee* obtaining a renewal. For instance, the case he cites of *Holt* v. *Holt* (2) lays down the rule that, if a trustee of a term surrender and take a further term, that shall be for the benefit of the cestuis que trust. Lord Bathurst is addressing his mind simply to the old doctrine of a *trustee* renewing a lease. The decision in fact does not carry the law any further than the cases he cites, of *Keech* v. *Sandford* (3), *Holt* v. *Holt* (2), *Witter* v. *Witter* (4), and *Pierson* v. *Shore*. (5) None of those cases shew that Lord Bathurst's expression "persons interested" has the extended meaning now sought to be given to it, or mean more than persons interested as trustees or mortgagees. In *Pickering* v. *Vowles* (6) Lord Thurlow merely states the rule as laid down in *Rawe* v. *Chichester* (7), that a trustee renewing does so for his cestuis que trust, and he applies it to a tenant for life on the ground that he is in possession with a limited interest.

[ROMER L.J. He puts it under the head of "tenant right."]

That merely means the right of a tenant "in possession."

(1) Amb. 719.
(2) (1670) 1 Ch. Ca. 190.
(3) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.
(4) (1730) 3 P. Wms. 99.
(5) (1739) 1 Atk. 480 (cited sub nom. *Mason* v. *Shove*).
(6) 1 Bro. C. C. 197, 198.
(7) Amb. 715.

Here the appellant is not in possession : it is the administratrix who is in possession as representing the estate.

[Romer L.J. A statement of the principle is given in the note to *Pickering* v. *Vowles*. (1) In *Griffin* v. *Griffin* (2) it is stated that the ground for decreeing, in the case of an infant interested, that a renewal by trustees shall enure for the benefit of the infant, is "public policy."]

I submit that the note to *Pickering* v. *Vowles* (1) states the principle more broadly than is justified by the case it refers to, *James* v. *Dean* (3), where the person taking the renewal was executrix and tenant for life. All the extensions of the rule have originated in trusteeship. For instance, a tenant for life is not allowed to hold a renewal for his own benefit, because under the settlement he is holding for life only, and he is bound to hand over the estate in the same condition to the remaindermen.

[Romer L.J. The principle underlying all the cases seems to be this: all persons interested in a lease have something, in the nature of a special advantage over others, which the Court of Equity will recognise; and if one of those persons tries to avail himself of that interest by getting the benefit of a renewal for himself, the Court will say that he must hold it for the benefit of all.]

That is on the ground that each person has what has been termed a "tenant right"; here the plaintiff had no tenant right, for the original lease had expired during his father's lifetime; he never was a tenant in common of the lease, and had no direct interest of any kind in it. He simply gets a new lease granted to him by the landlord, who had refused to grant one to any other member of the family. I say, therefore, that he was under no incapacity to contract for and obtain a new lease to himself merely because he happened to be one of the testator's next of kin.

There is not a suggestion to be found in the text-books that the doctrine laid down in *Rawe* v. *Chichester* (4) and the other

(1) 1 Bro. C. C. 197.
(2) (1804) 1 Sch. & Lef. 352, 354; 9 R. R. 51.
(3) 11 Ves. 383; 8 R. R. 178.
(4) Amb. 715.

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cases can be extended as has been contended for here. In Lewin on Trusts, 10th ed. p. 193, under the head of "Constructive Trusts" the author enumerates the cases in which a renewal by a person having a partial interest in the old lease is to be held for the benefit of the persons interested in the old lease, and he commences with the case of a tenant for life; but such a case as the present is not among the instances given.

[COZENS-HARDY L.J. referred to *Taster* v. *Marriott.* (1)]

There the tenant for life renewed while in possession under the old lease, and it was held that the new lease was an "ingraftment" on the old. In the present case the plaintiff never held the old lease at all, and therefore the new lease cannot be an "ingraftment" on it.

[ROMER L.J. Lord Manners L.C. in *Winslow* v. *Tighe* (2) approves of Lord Bathurst's reasoning in *Rawe* v. *Chichester.* (3)]

The only part of Lord Bathurst's judgment he quotes I agree with. In *Nesbitt* v. *Tredennick* (4) Lord Manners points out that the foundation of the tenant for life and mortgagee cases is that it is inequitable to go behind the back or take advantage of the remainderman or the mortgagor.

[COZENS-HARDY L.J. That case is commented on in 2 White and Tudor's Equity Cases, 7th ed. p. 702.]

As to *Clegg* v. *Fishwick* (5), that case does not touch the present case at all; but, if anything, it is rather in my favour.

With regard to the question whether there is any fiduciary relation between tenants in common, *Hamilton* v. *Denny* (6) does not support that view, for Lord Manners was treating the case as one under the joint tenancy rule, which is based on the principle of partnership. *Jackson* v. *Welsh* (7) was not decided on the ground of tenancy in common, but of trusteeship: it does not lay down anything favourable to the view that there is a fiduciary relation between tenants in common.

(1) (1768) Amb. 668.
(2) (1812) 2 Ball & B. 195, 205; 12 R. R. 75.
(3) Amb. 715.
(4) (1808) 1 Ball & B. 29, 46; 12 R. R. 1.
(5) 1 Mac. & G. 294.
(6) 1 Ball & B. 199; 12 R. R. 14.
(7) Ll. & G. t. Plunket, 346, 351.

Also *Palmer* v. *Young* (1) is treated in 2 White and Tudor's Equity Cases, 7th ed. p. 701, as a joint tenancy case.

Then it is said that the next of kin are quasi-partners; but that is only the same question put in another way. I submit that this lease is not part of the estate of the deceased at all: it is an entirely new and independent lease.

Then with regard to the infant. *Ex parte Grace* (2) is a different case. There the infant was jointly interested in the lease, which was a beneficial lease, with the person who obtained the renewal to himself only. Here the infant never had any joint interest in the lease, for it had expired four years before the death of the intestate. If the plaintiff, as one of the next of kin, was under no personal incapacity to contract with the landlord, the infant has really nothing to do with the matter.

In re Lord Ranelagh's Will (3) was a very special case, depending upon statute.

In conclusion, I submit that there is no instance to be found in the books in which a person has been hit by renewal unless he is in a fiduciary position, or is in the position of a tenant for life or a mortgagee. The defendant has no actual decision in her favour: she can only rely upon certain dicta.

Collins M.R. We will take time to consider our judgment.

Cur. adv. vult.

March 19. Collins M.R. stated the facts, and continued:— Buckley J. considered himself bound by *Ex parte Grace* (2), and, but for that case, his view, as I understand his judgment, was in favour of the appellant. He considered that that case compelled him to hold that the appellant stood in such a position as to be under a personal incapacity to accept the renewal otherwise than as trustee for all persons interested in the estate. If, on the other hand, he was at liberty to consider the special circumstances under which the renewal

(1) 1 Vern. 276. (2) 1 Bos. & P. 376.
(3) 26 Ch. D. 590.

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was accepted, his view was—and I think it is entirely borne out by the affidavits—that there was nothing in the appellant's conduct which was unfair, or such as to disentitle him to retain the benefit of the renewal. There are, no doubt, many cases in which the presumption of personal incapacity to retain the benefit is one of law and cannot be rebutted. The simplest instance is that of a trustee, as in *Keech* v. *Sandford*. (1) But the principle has been extended to cover other persons who are not primarily trustees at all; as, for instance, tenants for life towards those in remainder. The foundation of the presumption in their case is that they can take only what the will or settlement under which they make title gives them, and that a renewal must be looked on as an accretion to or graft upon the original term arising out of the goodwill or quasi-tenant right annexed thereto, and that their rights to such accretion are those which they have in the term, and no greater, and terminate with their own life: *Taster* v. *Marriott* (2); *Rawe* v. *Chichester* (3); *James* v. *Dean* (4); and other cases cited in Lewin on Trusts, 10th ed. p. 193.

But there is another class of cases in which, as it seems to me, there is no presumption of law, but at most a rebuttable presumption of fact. In this class apparently are mortgagees: *Rushworth's Case* (5): joint tenants, *Palmer* v. *Young* (6): and partners, *Featherstonhaugh* v. *Fenwick*. (7) Primâ facie, a mortgagee cannot renew for himself: he cannot hold the accretion, any more than he can hold the term itself, free from the right to redeem; the reason here is analogous to that which governs the rights of tenants for life. But in this case the presumption is apparently rebuttable; and in *Nesbitt* v. *Tredennick* (8) Lord Manners held it was rebutted. He said (9): "Here no part of Nesbitt's conduct shews a contrivance, nor was he in possession: all that Nesbitt or Tredennick treated for, was a new lease, giving however full opportunity to the

(1) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.
(2) Amb. 668.
(3) Amb. 715, 720.
(4) 11 Ves. 383, 395; 8 R. R. 178.
(5) Freem. 13.
(6) 1 Vern. 276.
(7) (1810) 17 Ves. 298; 11 R. R. 77.
(8) 1 Ball & B. 29; 12 R. R. 1.
(9) 1 Ball & B. 47.

plaintiffs, to dispose of their interests or to renew if they were enabled so to do."

As to partners, "It is clear," says Sir W. Grant, in *Featherstonhaugh* v. *Fenwick* (1), "that one partner cannot treat privately, and behind the backs of his co-partners, for a lease of the premises, where the joint trade is carried on, for his own individual benefit: if he does so treat, and obtains a lease in his own name, it is a trust for the partnership." And he then proceeds to examine the facts on that basis, and finds unfair dealing in fact. A joint tenant who is not a partner can be under no higher obligation.

Tenants in common do not stand in a fiduciary relation to each other: *Kennedy* v. *De Trafford* (2); and one of two mortgagors, tenants in common, is not debarred from buying for himself the undivided equity of redemption in the whole.

The reason of the rule in the case of trustees and others whose liability is absolute and irrebuttable is said to be public policy: *Griffin* v. *Griffin* (3), per Lord Redesdale; *Blewett* v. *Millett* (4); and is based, it would seem, largely on the fact that possession gives to such person an opportunity of renewal—*Pickering* v. *Vowles* (5), per Lord Thurlow—acting upon the goodwill that accompanies it: *James* v. *Dean* (6), per Lord Eldon. It may well be, therefore, that different considerations apply in the case of persons not in possession.

In the present case the appellant is simply one of the next of kin of the former tenant, and had, as such, a possible interest in the term. He was not, as such, a trustee for the others interested, nor was he in possession. The administratrix represented the estate and alone had the right to renew incident thereto, and she unquestionably could renew only for the benefit of the estate. But is the appellant in the same category? Or is he entitled to go into the facts to shew that he has not, in point of fact, abused his position, or in any sense intercepted an advantage coming by way of accretion

(1) 17 Ves. 298, 311; 11 R. R. 77.
(2) [1897] A. C. 180.
(3) 1 Sch. & Lef. 352, 354; 9 R. R. 51.
(4) (1774) 7 Bro. P. C. 367.
(5) 1 Bro. C. C. 197, 198.
(6) 11 Ves. 383, 395; 8 R. R. 178.

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to the estate. He did not take under a will or a settlement with interests coming after his own, but simply got a possible share upon an intestacy in case there was a surplus of assets over debts. It seems to me that his obligation cannot be put higher than that of any other tenant in common against whom it would have to be established, not as a presumption of law but as an inference of fact, that he had abused his position. If he is not under a personal incapacity to take a benefit, he is entitled to shew that the renewal was not in fact an accretion to the original term, and that it was not until there had been an absolute refusal on the part of the lessor, and after full opportunity to the administratrix to procure it for the estate if she could, that he accepted a proposal of renewal made to him by the lessor. These questions cannot be considered or discussed when the party is by his position debarred from keeping a personal advantage derived directly or indirectly out of his fiduciary or quasi-fiduciary position; but when he is not so debarred I think it becomes a question of fact whether that which he has received was in his hands an accretion to the interest of the deceased, or whether the connection between the estate and the renewal had not been wholly severed by the action of the lessor before the appellant accepted a new lease. This consideration seems to get rid of any difficulty that one of the next of kin was an infant. The right or hope of renewal incident to the estate was determined before the plaintiff intervened.

Ex parte Grace (1), by which Buckley J. considered himself bound, does not, in my opinion, cover the present case. There Grace had married the administratrix of the deceased owner of the term, and held the term in her right and subject to the trusts on which she held it. He was, therefore, in no better position than she would have been had she, being unmarried, obtained the renewal. *Keech* v. *Sandford* (2), which Eyre C.J. must have had in his mind, was directly in point, and the renewed term could not be held otherwise than as part of the estate.

I may also point out that in *Ex parte Grace* (1), even if the

(1) 1 Bos. & P. 376. (2) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.

beneficial interests only of those entitled to the old lease which was renewed are looked at, there were ample grounds for supporting the decision, for the old lease belonged partly to an infant; and when possession of the demised premises was taken by the stepfather, the latter (who renewed the lease) became, in contemplation of law, a bailiff or agent for the infant in respect of the infant's share or interest, and was therefore in that capacity also in a strictly fiduciary position when he applied for a renewal: see Co. Litt. 90 a, *Thomas* v. *Thomas* (1), and *Quinton* v. *Frith* (2), where the cases are collected.

Ex parte Grace (3), as Buckley J. says, seems to be somewhat loosely reported, but the dicta must be read in reference to the true facts.

Some reliance was placed by the respondent on the dictum of Lord Bathurst in *Rawe* v. *Chichester* (4), that "If trustees, mortgagees, and persons interested, obtain renewal, the new lease is always subject to the trusts and limitations of the old lease"; but the cases cited by him shew that he had not in his mind such an interest as that of the appellant in this case. No decision has in fact gone as far as we are asked to go here; and, in my opinion, the principle to be extracted from the authorities does not cover this case. Public policy, which is said to be the basis of the principle, does not seem to me to require that every person who takes an interest, however slight, in the estate of an intestate of which a lease formed a part should be under a personal incapacity to hold a renewal of such lease in his own right. While, therefore, I am bound to differ from the actual decision of the learned judge, I feel that I am giving effect to his own view.

The appeal must be allowed.

ROMER L.J. I agree with the judgment of the Master of the Rolls and need not add anything to what he has said about the case of *Ex parte Grace* (3), on the authority of which my brother Buckley decided this case. But since the arguments

(1) (1855) 2 K. & J. 79.
(2) Ir. R. 2 Eq. 396.
(3) 1 Bos. & P. 376.
(4) Amb. 715, 719.

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on this appeal I have had an opportunity of looking at most of the authorities bearing on the subject, and I think it may be useful if I add some observations upon them. I am induced to do this because there are some dicta of judges—notably of Lord Bathurst L.C. in *Rawe* v. *Chichester* (1)—and some statements in text-books, which might lead to the supposition that if any person, only partly interested in an old lease, obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease. In my opinion, the authorities, when examined carefully, do not support any such general proposition. I will endeavour to state, as shortly as I can, to what extent they have gone.

In the first place, so far as regards the circumstances under which the new lease is obtained, the equitable doctrine I am considering is not limited in its application to cases where the old lease was renewable by agreement or custom, or where the new lease was obtained by surrender or before the expiration of the old lease. There may well be, and often is, an advantage, for the purpose of obtaining a new lease, in being in the position of an old lessee; and that advantage may be of appreciable value in the view of a Court administering equity, even though the landlord is under no obligation to grant a new lease to the old tenant. And, further, I may note here that the cases shew that, with regard to a person obtaining a renewal who occupies a fiduciary position, it is contrary to public policy to allow him to rebut the presumption that in obtaining a renewal he acted in the interests of all persons interested in the old lease. I may also add that some of the decided cases, where persons not in a fiduciary position obtaining renewals have been held to be constructive trustees, depend upon the fact that those persons acted fraudulently in the matter; as, for instance, by representing to the lessors, or by inducing or allowing the lessors to believe, that they were acting in the interest of those entitled to the old lease. And of course, if a person has obtained a new lease by reason and

(1) Amb. 715.

in consideration of a surrender or attempted surrender of an old lease or rights belonging to third parties, he cannot, as against those third parties, pretend to hold the new lease as his own absolute property. But cases falling within the two last-mentioned classes stand apart, and need no further examination by me.

I now proceed to consider the cases with reference to the position of the person obtaining the renewal. The cases where the person has clearly occupied a fiduciary position in the matter, including an executor, administrator, trustee, or agent, need not be dwelt upon, as they present no difficulty. I need only remark in passing that it must not be forgotten that, if a stranger enters into possession of an infant's property, he is to be regarded as acting as a bailiff or agent for the infant in respect of that property.

The cases which really demand full consideration are those where the person renewing the lease does not clearly occupy a fiduciary position. On inquiry into those cases it appears to me, as a result, that a person renewing is only held to be a constructive trustee of the renewed lease if, in respect of the old lease, he occupied some special position and owed, by virtue of that position, a duty towards the other persons interested. Take, for example, the case of a tenant for life under a settlement of leaseholds. Although not a trustee for the remaindermen, yet his position is not that of a stranger as regards them. He owes, by virtue of his position, certain duties towards them in respect of the settled property; and if, by virtue of his position, he is enabled to obtain a renewal of the lease, equity clearly demands that the new right obtained in virtue of the old should be regarded as a graft on the old, and be treated accordingly as settled property.

Take next the case of a partner obtaining a renewal of a partnership lease: here, apart from the fact that in ordinary cases concerning the carrying on of the partnership business he is an agent for the partners, he clearly owes a duty to his co-partners not to acquire any special advantage over them by reason of his position. And, therefore, as a rule, even if a partnership lease has come to an end, yet if that partner, by virtue of his position, obtains a renewed lease, he will be held

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to have acquired it on behalf of all the partners. As Lord Selborne L.C. said in *Cassels* v. *Stewart* (1), "A man obtaining his locus standi, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligation to his co-partners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them." Yet even with regard to partners, between whom the utmost good faith is required by a Court of Equity, there are the following observations made by Turner L.J. in *Clegg* v. *Edmondson* (2): "I am not prepared to say that in no case can a partner during the continuance of the partnership contract for a new lease to be granted to himself of property which is in lease to the partnership without the new lease being held to be subject to trusts for the benefit of the partnership. The authorities, I think, do not warrant that position; but this, I think, is plain upon all the authorities, that it is very difficult for any partner to secure to himself to the exclusion of his co-partners the benefit of a lease so contracted for, and the difficulty is certainly greater where the contracting partners are, as in this instance they were, the managing partners."

I will next deal with the cases decided as between mortgagor and mortgagee. Each of these owes a duty to the other in respect of the mortgaged property; and in case of one being able, by virtue of his position, to obtain a renewal of a mortgaged lease, there are obvious grounds why it should be held against him, at any rate as a rule, that the renewed lease should be treated as engrafted on the old and as forming part of the mortgage security. In the case of a mortgagee renewing, it was put as follows by the Court in the case of *Rakestraw* v. *Brewer* (3): "This additional term comes from the old root, and is of the same nature, subject to the same equity of redemption, else hardships might be brought upon mortgagors by the mortgagees getting such additional terms more easily, as being possessed of one not expired, and by that means worming out and oppressing a poor mortgagor."

The only case that seems to call for special comment, beyond

(1) (1881) 6 App. Cas. 64, 73. (2) (1857) 8 D. M. & G. 787, 807.
(3) (1728) 2 P. Wms. 511, 513.

what I have already said, is that of *Palmer* v. *Young* (1), which is represented by some text-books as laying down a general proposition about one of several joint tenants renewing for his own benefit. That case is so shortly reported in 1 Vernon that I found it impossible to perfectly ascertain what the facts were, and I accordingly had the records and the registrar's note-book searched. The transcription of the records was somewhat difficult; but in result I have ascertained that the following are the facts of the case and the grounds of the decision of the Court, omitting unnecessary details. A lessee for lives from the Bishop of Rochester assigned part of the demised premises for the lives, at a proportioned part of the rent, to the plaintiff's predecessor in title. The lease was left in the hands of the principal defendant in order to enable him to renew. He obtained a renewal by availing himself of the possession of the lease, and by concealing the fact of the previous assignment, and by surrendering the old lease which still had two lives in existence. The renewed lease was for an additional life. The plaintiff brought his suit in Chancery seeking to have it declared that under the circumstances the defendant was a trustee of the renewed lease, so far as concerned the assigned premises, and that the plaintiff was entitled to the benefit of the extra life on his paying a proportioned part of the rent and of the expenses of renewal. The defendant admitted the facts, and offered to place the plaintiff in his old position, so far as concerned the two lives, by granting him a lease, but otherwise claimed for himself the benefit of the renewal. The Court found as a fact (as appears from Registrar Edwards' minute-book of November 27, 1684) that the defendant had gone with the "parchment" (i.e., the old lease itself), and "pretended an interest in the whole," and had so obtained a renewal for an extra life to the exclusion of the plaintiff; and under these circumstances of course the Court held the plaintiff entitled to relief. And as there was some doubt as to the validity of the new lease (presumably because the plaintiff, as assignee of part of the demised premises, had not joined in the surrender) it was ordered that the plaintiff and defendant

(1) 1 Vern. 276. (See note at the end of this case.)

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should join in surrendering the premises and obtaining a new lease. These facts shew that the case was one of clear breach of faith, and was decided on its special circumstances, and is no authority whatever to support the more general proposition for which it is often cited.

To conclude, the result of my investigation of the cases is that, neither on authority nor on principle, can the appellant in the present case be held a trustee of the new lease he has obtained. He was in nowise in any fiduciary position in respect of the matter; he owed no duty to any one in respect of it; he has been guilty of no fraud or concealment; and he has not used any right that a Court of Equity can recognise as belonging to other persons to enable him to obtain the lease.

I therefore agree in thinking that the appeal must succeed.

Cozens-Hardy L.J. I am of the same opinion. I have had the opportunity of reading the judgments of the Master of the Rolls and Romer L.J., and I need only say that I entirely agree with them.

[Their Lordships then made an order declaring that the appellant was entitled to retain the new lease for his own benefit, and directing that the costs of all parties, both on the appeal and below, should come out of the estate.]

T. H. Carson, K.C., asked whether fees to counsel for attending to hear judgment would be allowed under the recent Practice Notes on Taxation of Costs, 1902, issued from the Supreme Court Taxing Office. On p. 20 was the following note: "*Judgment*, Fee to hear, will be allowed as the exception, not the rule; but when it is proper for counsel to attend to hear judgment, fees to all counsel may be allowed."

Romer L.J. We cannot, after every judgment, have a discussion of this kind. The rule has always been, so far as I know, to allow a fee to counsel when attending to hear judgment in another term. I have never heard it applied to attending to hear judgment in the same term or sittings. The only instance in which a separate fee for attending to hear

judgment is allowed is when judgment is given in sittings other than those in which the case was heard.

Solicitors: *A. Price; T. H. Meynell.*

NOTE.

Through the kindness of Lord Justice Romer the reporter is enabled to supply the following report of *Palmer* v. *Young*, 1 Vern. 276, from the certified transcript, furnished to his Lordship by the Public Record Office, of the original records of the case. The engrossment of the judgment or order is much mutilated, apparently owing to damp or other causes, consequently the transcript contained several lacunæ, which are indicated in the subjoined report by brackets. These lacunæ the reporter has ventured to fill in partly from conjecture and partly from his own examination of the record. The transcript is given verbatim except that the spelling is modernized. It will be noticed, as somewhat singular, that there were two Chancery Registrars, Registrar Edwards and Registrar Devenish, in Court during the hearing of the case, and that each took a note of the argument and of the minutes of judgment.

"REGISTRARS' MINUTE BOOKS (CHANCERY).

Michaelmas Term, 1684.

Registrar Edwards.

Vol. 400.

Jovis (Thursday),
27° Novembris 1684.

Lord Keeper (1).

PALMER *v.* YOUNG.

Hancocke [for plaintiff]. The Bill is to have our proportion of Elsted Wood according to agreement.

Whittlocke, for Defendant. They shall have it as to two lives. But for the third life he hath no title to it.

North (2), for plaintiff. We have a part of the whole lease and they would renew without us and exclude us out of our moiety of our tenant right.

Mr. Solicitor-General (3), for defendant. Either our lease is good or not, and if not good it will not hurt them;

(1) Sir Francis North, created Lord Guilford, 1683.—G. I. F. C.

(2) Probably Roger North (1653–1734), brother of the Lord Keeper. He was appointed a King's Counsel in 1682.—G. I. F. C.

(3) The Hon. Heneage Finch, the second son of Lord Keeper Sir Heneage Finch, who, on his appointment in 1673, was created Baron Finch of Daventry, and in 1681, having been appointed Lord Chancellor in 1675, was created Earl of Nottingham. When at the Bar he was called, from his persuasive powers, "the English Cicero," and from his graceful action "the English Roscius." His son, the Hon. Heneage Finch, served as Solicitor-General during the later years of Charles II., and at the beginning of the reign of James II., by whom he was deprived of his office in 1686. Two years later he acted as leading counsel for the Seven Bishops. He was subsequently created Earl of Aylesford.—G. I. F. C.

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and have denied the trust, and this is on bill and answer.

The answer read.

Hancock the trust confessed.

Cur. Since [Young] did go with the parchment and pretend an interest in the whole and have renewed for a life exclusive to the plaintiff,

Therefore let Legard (1) settle what the defendant hath paid in rent and to the bishop for fine and charges of suit in recovering the rent, and shall be at the whole charge in the renewing for the three lives in being, and then decree the plaintiff to have the full benefit of the renewal.

Registrars' Minute Books (Chancery).

Michaelmas Term, 1684.

Registrar Devenish.

Vol. 401.

Jovis, 27° Novembris 1684.

Lord Keeper.

Palmer *v.* Young.

Hancock [for plaintiff]. The bill that according to an agreement we may have the benefit of the first lease so far as our share paying proportion.

Whitlock [for defendant]. Have denied the agreement. Nothing appears but that may go to law.

The cause at bill and answer.

Mr. North [for plaintiff]. They have owned the trust in the answer.

Cur. The plaintiff shall have the benefit of the renewal paying the proportion of the fine and the interest and the rent and interest. Let Legard compute it and shall have charges also and both join and the plaintiff join in the surrender. Defendant no relief, and the plaintiff to be at all the charges and the charges of suing for the rent.

Entry Book of Decrees and Orders (Chancery).

1684 B. fol. 124.

Jovis 27 Novembris.

Lord Keeper.

William Palmer, Mercator. . . . } Plaintiff;

Thomas Young and Peter Langston . } Defendants.

Upon the hearing and debating of the matter in question between the said parties this present day in the presence of the counsel learned on both sides, the substance of the plaintiff's bill appeared to be that Walter, late Bishop of Rochester, by indenture dated 26 November, 5 Charles I. [A.D. 1629] for the consideration therein mentioned did, among other things, demise unto John Young in the bill named, and his heirs at Elmesteed Wood in Bromley in the county of Kent, to hold during the lives of Robert Thomas and William Young, the said John Young's sons, and the longest liver of them under [the rent] of 6*l.* per annum for the whole: And that John Young, son and heir of John Young, toge[ther wi]th George Young, his fourth son, in whom, or one of them, the right of the premises was duly vested by indenture dated the 26th of November, 1655, did sell the said wo[od land] part of the premises redemised to the plaintiff's father, to hold during the said lives u[nder t]he yearly rent of 40 shillings,

(1) Sir Robert Legard, a Master in Chancery.—G. I. F. C.

and for equal benefit of the said parties and renewing t[he said] lease and for better security did leave the original lease with the def[endant] La[ngs]ton as an equal trustee, not to be delivered out of his custody without con[sent] of [all partie]s, by virtue whereof the plaintiff's father enjoyed the premises till his death, a[fter which] the estate came to the plaintiff as son and heir to his said father, but the de[fendant Langston in bre]ach of his said trust delivered the said original lease to the other defendant [Young, who by] contrivance hath got a new lease of all the premises from John, now Lord Bishop [of Rochester, and] endeavours to get possession and procured declarations in ejectment to be delivered to [the plaintiff in the bisho]p's name to oust the plaintiff of his possession: And therefore to discover w[hether the said d]efendant Langston was not intrusted with the original lease and w[hether the defendant] Young hath surrendered the said lease to the said John Lord Bishop of Roc[hester and whe]ther the bishop hath not granted a new lease and what money was really [paid thereupon]; and that the plaintiff may have a proportionable benefit of renewing the said [lease and may be] relieved in the premises, is the scope of the bill: Whereto the counsel [for the defendants alleg]ed that they had by their answer set forth that they believe there was such [lease fro]m Walter, late Bishop of Rochester, as in the bill is set forth: And the defendant [Young sa]ys he has heard that his said father made his will as in the bill, but he [says that] the said devise is void in law although the said George, after his father's death, entered on [the prem]ises and hath heard that George Young and Sir John Young, son and heir of the [said Jo]hn Young, did make such deed dated 26th of November, 1655, as the bill sets forth w[her]eby Elmesteed Wood only was conveyed to the plaintiff's father, and that by virtue t[hereo]f the said plaintiff's father was in possession during his life, and that after his death the said [wood]land, part of the premises redemised by the bishop, came to the plaintiff, and co[nfe]sseth the defendant Langston did deliver the original lease four or five years since [to him] in order to his getting the same renewed and that he hath renewed the same and [go]t a new grant of the premises called Elmesteed Wood inter alia for his own life and for the lives of his said brother and daughter; and if the plaintiff can prove his t[itle he] is contented to let him enjoy that part of the premises called Elmesteed Wood during the said lives provided he will take a lease thereof from the defendant and pay his proportion [of] the rent, but does not intend to let the plaintiff have any benefit of renewing the said lease made by the bishop, and believes there never was any agreement made by the said plaintiff's father for him to have any benefit of renewing the said lease, for that he owned his title from the usurped powers and not from the bishop, and never paid any rent to the bishop nor to the defendant till he was sued for the same and a recovery at law had against him, and then he paid his share to the defendant: And the defendant Langston believes he had the original lease in his custody twenty-four years, and afterwards at the request of the defendant Young did deliver it to him, and the renewed lease of the premises is now in the said defendant Young's custody, and he is a stranger to the rest of the charges in the bill: Whereupon, and upon long debate of

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the matter and hearing what could be alleged on either side, this Court was satisfied that the plaintiff ought from time to time to have the benefit of renewing of the said leasehold premises sold to the plaintiff's father, paying his proportion of the fine and rent and other charges in renewing, together with interest for the same from the time the said fine was paid: And doth therefore order and decree the same accordingly: And that it be referred to Sir Robert Legard, Knt., &c., to examine what really was paid by the defendant for the renewal of the said lease and just charges in procuring the same, and to compute the plaintiff's said proportion thereof and interest thereof: And what on the said master's report shall appear due to the defendant for principal money and interest as aforesaid the said plaintiff is to pay the same to the said defendant at such time and place as the said master shall appoint, together with the charges of renewal as aforesaid, as also the charges at law against the plaintiff, if any shall appear to be due: And on payment of what on the account aforesaid shall appear due from the plaintiff to the defendant—it is hereby further ordered and decreed that the defendant as well as the plaintiff do join in a surrender of the premises and take a new lease thereof at the plaintiff's and defendant's proportionable charges; and the said master is to direct and settle such surrender and assignment in case the parties differ about the same; and the plaintiff is to hold and enjoy the premises sold to the plaintiff's father accordingly against the defendants and all claiming under them: but in default of the said plaintiff's doing and performing of what is hereby before directed, the said plaintiff's bill [is] from thenceforth to stand a[bs]olutely dismissed out of this Court. H. D. (1)"—G. I. F. C.

(1) "H. D." are the initials of Registrar "Henry Devenish."

G. I. F. C.

In re EARL HOWE'S SETTLED ESTATES. EARL HOWE *v.* KINGSCOTE.

[1903 H. 227.]

C. A.
1903
BUCKLEY J.
March 11, 12.
C. A.
April 2.

Estate Duty—Settled Estate—Tenant for Life—Instalments, Duty payable by—Interest on Unpaid Duty—Charge on Inheritance—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-s.* 8; *s.* 9, *sub-s.* 5.

The general rule that, in the absence of special circumstances, the tenant for life of a settled estate is bound to keep down the interest on charges on the inheritance, is not affected by the Finance Acts, 1894 and 1896; so that, although under the power given to him by s. 9, sub-s. 5, of the Act of 1894 he may charge the inheritance with instalments of estate duty payable by him under s. 6, sub-s. 8, he cannot also charge it under s. 9, sub-s. 5, with the interest on the unpaid portion of the duty unless he can shew that such interest has been "properly incurred by him."

Decision of Buckley J. affirmed.

IMMEDIATELY prior to the death of the third Earl Howe the family estates stood limited, under and by virtue of a deed of resettlement of 1883, to the use of the third Earl for life, with remainder to the use of the fourth Earl for life, with remainder to the use of Viscount Curzon, the then only child of the fourth Earl, for his life, with remainder to the use of the first and other sons of Viscount Curzon in tail male.

The third Earl died on September 25, 1900, whereupon the plaintiff, the fourth Earl, became tenant for life of the settled estates. The estate duty payable by him on the death of the third Earl was assessed at 50,163*l.* 2*s.* 3*d.*, which he elected to pay by eight yearly instalments of 6270*l.* 7*s.* 9*d.* each. The first instalment was duly paid, and the second instalment fell due on September 25, 1902, when demand was made by the Inland Revenue authorities upon the plaintiff for payment of that instalment, together with the sum of 1316*l.* 15*s.* 8*d.*, being the interest for one year from September 25, 1901, at 3 per cent. upon the whole of the unpaid duty, 43,892*l.* 14*s.* 6*d.*

The fourth Earl being desirous of having the instalment that had become due, and also the 1316*l.* 15*s.* 8*d.* interest, raised out of the corpus of the settled estates, took out an originating

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summons under the Finance Acts, 1894 and 1896, against the trustees of the settlement and Viscount Curzon, who was an infant, for the determination of the following questions: (1.) Whether the applicant was, as tenant for life in possession, entitled to raise by sale, mortgage or charge of the settled estates, or a competent part thereof, or to direct the application by the defendants, the trustees, of capital moneys in their hands in or towards the payment of, (*a*) the instalment of estate duty which became due on September 25, 1902, and (*b*) the interest which became payable therewith on that date; and (2.) Whether the applicant would similarly be entitled to raise or direct payment of the future instalments of estate duty as and when they became due, together with the interest payable therewith.

The case was argued before Buckley J. on March 11, 1903, and at the conclusion of the arguments his Lordship reserved judgment.

R. J. Parker, and *G. R. Northcote*, for the plaintiff.

Ashworth James, for the defendant, the infant remainderman.

Kenyon Parker, for the defendants, the trustees of the settlement.

March 12. BUCKLEY J. Upon the death, on September 25, 1900, of the third Earl Howe, certain property settled by a deed of May 31, 1883, of which the third Earl was tenant for life, devolved for an estate for life in possession upon the plaintiff, who was the next tenant for life in remainder. The duty was assessed at 50,163*l.* 2*s.* 3*d.*, and the plaintiff elected to pay it by eight annual instalments, the amount of each instalment being 6270*l.* 7*s.* 9*d.* Under s. 6, sub-s. 8, of the Finance Act, 1894, the first instalment is payable at a year from the death, that is, in the present case, on September 25, 1901, without interest. The second instalment is payable at the end of the second year, namely, on September 25, 1902, with interest on the unpaid portion of the duty added to the instalment, and that interest is 1316*l.* 15*s.* 8*d.*

The question I have to determine is whether, under s. 9,

sub-s. 5, of the Act, the tenant for life is entitled to throw upon the inheritance both the 6270*l.* 7*s.* 9*d.*, the amount of the second instalment, and the 1316*l.* 15*s.* 8*d.*, the interest payable with it. In my judgment, he is not. Primâ facie, and unless there be some provision to the contrary in the statute, it is plain on general principles that the tenant for life, whose income is increased by the postponement of the payment of the duty, ought to bear the interest which is the price of obtaining that postponement.

The question is whether the statute contains anything which alters that, and enables the tenant for life to throw it upon the inheritance. That question arises upon the true construction of s. 9, sub-s. 5, of the Act. I am able to arrive at a construction which, it seems to me, is the just and fair one, although the words of the Act may, no doubt, create some difficulty. Under s. 6 the duty may be paid in either one of two ways. Under s. 6, sub-s. 6, it may be paid in one sum with interest from the date of the death up to the date of the delivery of the Inland Revenue affidavit or account, or the expiration of six months after the death, whichever first happens. If that alternative is taken, of course, the inheritance parts with the amount of the duty, and the income of the tenant for life is so much the smaller. The second alternative is under sub-s. 8, and is a course which may be taken at the option of the person delivering the account. That person may be the tenant for life, or any of several other persons within s. 6, sub-s. 2, or s. 8, sub-s. 4; it is not necessarily the tenant for life—it may be he, or it may be another. If a person exercises that option, then the duty is paid by eight annual instalments. There is no interest at all for the first year, but interest runs from the end of the first year, and a sum for interest is payable with the second and each subsequent instalment. If the Act, as amended by the Finance Act, 1896, had ended there, I should have thought there was no question at all, but that the different modes selected for payment of the interest did not alter in any way the incidence of the interest as between tenant for life and remainderman. It would be an extraordinary conclusion if, at the exercise of an option by any one of a number of persons

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who are accountable under the Act, the incidence of the interest could be altered as between the tenant for life and the remainderman. Such a thing could not be. But then the Act of 1894 goes on, by s. 9, sub-s. 5, to give the person who is authorized or required to pay the estate duty a certain right of raising the amount of such duty, and any interest and expenses properly paid or incurred by him in respect thereof by sale or mortgage of the inheritance. It is upon those words that the difficulty arises.

Now I wish first to say that, in s. 9, sub-ss. 5, 6, and 7, I think the word "duty" in the earlier part of sub-s. 5 and in sub-ss. 6 and 7 is used to describe the amount which the Revenue can demand. It does not mean, in other words, the duty as distinguished from the interest. It means, I think, that which the Revenue is entitled to receive. Then the person who pays that duty is, under s. 9, sub-s. 5, entitled to raise the amount of such duty, and any interest and expenses properly paid or incurred by him in respect thereof. It is noticeable that the persons who are entitled so to raise the amount there described are many and various. It may be the executor of the deceased tenant for life, who simply pays and recovers from somebody else; it may be a trustee; it may be any person to whom the property passes for a beneficial interest in possession; it may, therefore, include the tenant for life—or it may be any one of a number of other persons. The words "and any interest," therefore, are relevant and appropriate words to enable a person, who is not the tenant for life, to raise, if necessary, out of the inheritance, moneys which the person has paid, and which he is entitled to recover because he does not owe the money—he is entitled to get it back. The words are, "and any interest properly paid or incurred by him"; and I think I can properly attribute those words to the case of such persons as, not being the tenant for life, are entitled as against the settled property to say, "Never mind how the amount is to be borne as between the tenant for life and the inheritance; as between myself and both of them, I am entitled to be repaid." In other words, it is not necessary to read the words so as to say that the tenant for life, if he be the person who

pays, is to be entitled to raise the interest by sale of the inheritance and so as not to bear the interest.

There is another line of reasoning by which I may arrive at the same result—that is, upon the words "properly incurred by him." Suppose that a tenant for life who has become the person accountable for the duty, being minded to profit by a postponement of the payment of the duty, does not pay it when it falls due, then under s. 18, sub-s. 1, of the Act of 1896, the Revenue will be entitled to interest. It is impossible that it should be within the power of a tenant for life, by postponing the payment of the instalment, or whatever it may be, when it falls due: thus increasing his own income by reason of the fact that he has not parted with the corpus, then to throw upon corpus the interest thus accruing by reason of his own delay in making payment. Any interest so incurred would not, I conceive, be properly incurred by him. It would be incurred by him improperly in the sense that, as between him and the inheritance, he ought not to have allowed that interest to have accrued. In the same way, it appears to me, I can read the word "properly" as dealing with the other case—namely, the case with which I have to do. As between the tenant for life and the inheritance, the interest is not properly incurred so as to be borne by the latter to the indemnity of the former. It is properly incurred in the sense that the Revenue is entitled to it. But when you are considering the rights, not as between the Revenue and the estate, or those interested in the estate, but the rights as between successive limited interests in the settled property, then that interest, as it appears to me, is not properly incurred.

In my judgment, therefore, where the tenant for life is the person who under the Act of Parliament accepts the responsibility for paying the duty, and he pays an instalment and interest in respect of the unpaid portion of the duty, he is not a person who is entitled to raise that interest out of the inheritance. I arrive at that conclusion by attributing this construction to the words "and any interest"—namely, that they mean "and any interest in a case where the person who pays the duty is entitled as against the inheritance to

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interest"—that is to say, the words are to be read as applying to persons, other than the tenant for life, under s. 9, sub-s. 5. I arrive at the same conclusion upon what I have said upon the word "properly."

An argument was pressed upon me on behalf of the respondents to the following effect. It was said, and truly, that the Revenue has two sources of payment to look to. It has under s. 9, sub-s. 1, a right to a charge on the property itself; and it has also the right to look to the personal liability of such person as becomes under the Act accountable for that duty. It was argued that the person thus accountable for the duty being, we will assume, the tenant for life, was intended under s. 9, sub-s. 5, to have a right to sell or mortgage the inheritance for this interest in order that for the protection of the Revenue he might be rendered a solvent debtor capable of paying that duty. It appears to me that there is nothing in that argument. It is not necessary for the protection of the Crown that there should be two charges, the one in favour of the Crown directly, and the other in favour of the debtor to the Crown, so as to render that debtor a solvent person. The Crown is entirely protected by s. 9, sub-s. 1.

I am of opinion that the tenant for life is not entitled by sale or mortgage to raise this sum—1316*l.* 15*s.* 8*d.*

[His Lordship accordingly made an order declaring that the plaintiff was not entitled to raise the 1316*l.* 15*s.* 8*d.* out of the inheritance by sale, mortgage, or charge of the settled estates, or any interest on any future estate duty payable, but that he could raise by sale, &c., of the settled estates the instalment of 6270*l.* 7*s.* 9*d.* already due and the future annual instalments.]

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The plaintiff appealed from that order in so far as it declared that he was not entitled so to raise the 1316*l.* 15*s.* 8*d.* interest, or any interest on any future estate duty payable. The appeal was heard on April 2, 1903.

R. J. Parker and *G. R. Northcote*, for the plaintiff, Earl Howe, the tenant for life. We submit that, having regard to the various sections of the Finance Act, 1894 (57 & 58 Vict. c. 30), especially s. 9, sub-s. 5 (1), the tenant for life has power to raise

(1) The following sections of the Act were referred to in the course of the argument:—

Sect. 1 enacts that "estate duty" shall be paid upon the principal value ascertained as thereinafter provided of all property, real or personal, settled or not settled, which passes on death.

Sect. 2 defines what property shall be deemed to pass on death.

Sect. 3 provides for exemption in the case of a transaction for money consideration.

Sect. 4 provides for the aggregation of property so as to form one estate for the purpose of duty.

Sect. 5 provides, in the case of settled property, for a further estate duty, called "settlement estate duty."

Sect. 6 provides for the collection and recovery of estate duty. Sub-s. 6 provides that "Interest at the rate of 3 per cent. per annum on the estate duty shall be paid from the date of the death up to the date of the delivery of the Inland Revenue affidavit or account, or the expiration of six months after the death, whichever first happens, and shall form part of the estate duty." Sub-s. 8: "Provided that the duty upon an account of real estate may, at the option of the person delivering the account, be paid by eight equal yearly instalments, or sixteen half-yearly instalments, with interest at the rate of 3 per cent. per annum from the date at which the first instalment is due, less income tax, and the first instalment shall be due at the expiration of twelve months from the death, and the interest on the unpaid portion of the duty shall be added to each instalment and paid accordingly; but the duty for the time being unpaid, with such interest to the date of payment, may be paid at any time, and in case the property is sold, shall be paid on completion of the sale, and if not so paid shall be duty in arrear."

Sect. 7 provides how the value of an estate for the purpose of estate duty is to be ascertained.

Sect. 8, sub-s. 4, provides that where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, "every person to whom any property so passes for any beneficial interest in possession . . . . shall be accountable for the estate duty on the property," and shall deliver and verify an account. Sub-s. 10, providing that "interest on arrears of estate duty shall be paid as if they were arrears of legacy duty," is repealed by the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 of which provides that "simple interest at the rate of 3 per cent. per annum without deduction for income tax shall be payable upon all estate duty from the date of the death of the deceased, or, where the duty is payable by instalments, or becomes due at any date later than six months after the death, from the date at which the first instalment or the duty becomes due, and shall be recoverable in the same manner as if it were part of the duty."

Sect. 9 (of the Act of 1894), which makes the estate duty a charge upon the property and provides facilities for raising it, enacts by sub-s. 5, "A person authorized or required to pay the estate duty in respect of any

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whatever is payable by him to the Government in the shape of duty, whether it be interest or capital. The effect of s. 8, sub-s. 4, is to impose upon every person who comes into possession of an estate a personal liability for payment of the estate duty including interest. With regard to raising the estate duty and interest, the general practice is for the tenant for life to borrow the money from bankers or insurance companies, who, upon the production by the tenant for life of the certificate of the amount of duty payable and the requisition for payment, advance the money upon deposit by him of the title-deeds of the estate, a charge being thus obtained by virtue of sub-s. 5 of s. 9. The money is then usually paid by the lenders to the Government direct, and not to the tenant for life, and subsequently a proper mortgage is executed to them under this sub-section as security. If in every case the lender has to look into the position as between the tenant for life and the remainderman, it will become practically impossible to borrow the money, which is required to be paid by a certain day.

The words "properly incurred" mean properly incurred, not with regard to the remaindermen, but with regard to the Government. The object of the sub-section is simply to enable the Government to be paid. The sole question is, Has the tenant for life power to raise the interest on the duty? He is not asking here for administration, when it may be necessary to consider the circumstances of each individual case—whether it is for the benefit of the remaindermen or not

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property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminal charge on that property or any part thereof."

Sub-s. 6: "A person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him."

Sub-s. 7: "Any money arising from the sale of property comprised in a settlement, or held upon trust to lay out upon the trusts of a settlement, and capital money arising under the Settled Land Act, 1882, may be expended in paying any estate duty in respect of property comprised in the settlement and held upon the same trusts."

that the tenant for life should charge the interest on the inheritance—but it is purely a question of construction as to whether the Act gives him a power so to charge the interest; and this question is one of general and almost daily application. It will be observed that s. 6, sub-s. 8, which enables a tenant for life to pay the duty by instalments, provides that the interest on the unpaid duty shall be "added to" and paid with each instalment, and that in case the property is sold the unpaid duty "with such interest" shall be paid on completion of the sale; so that, in the present case, if the tenant for life were to sell the property, as he has power to do, the interest would be paid out of the purchase-money—in other words, he could have the interest, as well as the remaining duty, paid out of the capital. In like manner, we submit, he can charge the interest on the corpus of the estate. The words of sub-s. 5 of s. 9 are clear, and there is no reason for cutting them down. The interest is "properly incurred" to the Government by the tenant for life, and the meaning of the sub-section is evident from the language used—that the same person who has the power to raise the duty by a charge has power also to raise the interest. The sub-section is intended for the relief of the real estate and the persons succeeding to it, including the tenant for life. We accordingly submit that the general doctrine that a tenant for life must keep down the interest on charges must, in such a case as the present, give way to the express words of the enactment.

Ashworth James, for the infant remainderman, and

Kenyon Parker, for the trustees, were not called upon.

COLLINS M.R. This is an appeal from Buckley J. upon a question arising under the Finance Act, 1894. Mr. R. J. Parker, who has argued the case for the appellant with his usual ability, says, in effect, that he will be satisfied with nothing short of a declaration that, under s. 9, sub-s. 5, of the Act, the tenant for life has the right to charge the inheritance with interest upon the sum payable as estate duty under the Act. Now, I am certainly not prepared to go that length. It appears to me that the reasons given by Buckley J. in his

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exhaustive judgment have settled the question, and that his decision is right. And when one comes to read the sub-section, it appears to me that Mr. Parker's contention leaves out the most crucial part of it. No doubt the Finance Act does allow estate duty to be raised and paid by instalments under s. 6, sub-s. 8, and the tenant for life may pay it by those instalments; and the particular point that now arises is whether the tenant for life, having power to raise the duty itself by a charge upon the inheritance, is entitled also to raise the interest payable on that duty, having regard to the fact that the duty is paid by instalments, the interest payable in the present case amounting to 1316*l.* 15*s.* 8*d.* Now that question depends upon the construction of s. 9, sub-s. 5, which is in these terms: [His Lordship read the sub-section, and continued:—]

Now, it has not been disputed by either of the learned counsel for the appellant that it is the duty of a tenant for life to keep down the interest on charges—that it is a primary obligation upon him to do so. Now, has he, under this Act, to keep down the interest on the instalments, or is he entitled to charge that interest, as well as the instalments, upon the inheritance? According to the words at the end of the sub-section, the right conferred upon him is to raise "any interest and expenses properly paid or incurred by him" in respect of the duty; and unless the tenant for life who comes to ask to be allowed to raise the interest and expenses can aver and prove that the same have been "properly incurred" by him he is not entitled to raise the amount.

Now, how can it be said that a tenant for life has power to impose on the persons entitled in remainder the obligation to pay money which he ought himself to pay? How can it be said that interest has been "properly incurred" by him when he has not done that which he ought to do—that is, pay the money himself? This, shortly put, appears to be the principle upon which Buckley J. has decided this case. It may be that other persons have a right to raise the interest, but that right must stand on a different footing from that of a tenant for life. But when you come to the case of a tenant for life, it is impossible for the Court to dismiss from its mind this latter

part of the sub-section, and to say, without inquiry, and as an abstract proposition, that the tenant for life can be allowed to charge the inheritance with the amount of interest on estate duty. Mr. Parker says that to hold that a tenant for life cannot charge the inheritance with interest will be inconvenient to the insurance companies and banks who are in the habit of making advances to tenants for life to enable them to pay the duty and interest. But it is a matter for inquiry as to whether in any particular case the tenant for life has brought himself within the power given him by the sub-section to charge the interest by shewing that the interest has been "properly incurred." The interest, to be chargeable, must of necessity have been "properly incurred"; and the obligation is upon the tenant for life seeking to charge it upon the inheritance to shew that it has been "properly incurred." There is nothing before the Court in the present case to shew whether the interest has been properly incurred; and no special circumstances have been brought to the notice of the Court as a reason for allowing the tenant for life to charge the interest. It is not necessary for us now to state what special circumstances would justify the Court in allowing a tenant for life to charge the interest, but certainly it is impossible for us to make the declaration asked for here by this tenant for life—that he has an unqualified power of raising the interest by charging it upon the inheritance. I do not mean to say that there might not be cases of hardship in which the Court would hold that interest had been "properly incurred" by the tenant for life within the sub-section, but no such case has been made here.

I entirely agree with the reasoning of Buckley J., and, in my opinion, the conclusion at which he has arrived is right. The appeal must, therefore, be dismissed.

ROMER L.J. I have come to the same conclusion.

Under s. 6, sub-s. 8, a tenant for life has the option given him of paying the estate duty by instalments, and if he exercises that option he has, in paying the first instalment of duty, to pay also interest upon the unpaid portion of the duty. Now, except under some very special circumstances, it is, in my

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opinion, the clear duty of the tenant for life, as between himself and the remaindermen, to keep down the interest which has to be paid on the unpaid portion of the duty, and he is not entitled to cast the duty of paying that interest upon the remaindermen. It is a clear obligation cast upon him alone, and one which, to my mind, he is bound to perform. I find nothing in the Act which can justify the tenant for life, as between himself and the remaindermen, by exercising any of the general powers conferred upon him by the Act, in evading the obligation upon him to pay the interest, and which enables him to cast that obligation on the estate.

Mr. Parker says that s. 9, sub-s. 5, gives the tenant for life that power. In my opinion it does not. The section is a general clause giving a general power to various persons, among whom, I agree, is a tenant for life; but a general power so given would not, in my opinion, justify a tenant for life in exercising his power so as unduly to favour himself in the way he would be doing if he were allowed to do what the appellant here now asks. In my opinion, both his duty and his obligation prevent him from exercising his power so as to give himself an undue advantage. There is nothing in the necessities of the Crown to induce us to give a tenant for life such a power as is now asked for, namely, a power to exercise the provisions of the sub-section in his favour so as to give himself something to which he is not entitled.

Then there is this to be considered—that this application is an application coming from the tenant for life himself asking to be allowed to exercise this power for his own benefit. I think the Court is entitled to say, "We will not give you the direction you ask for, because, although there is a general power given by the Act to various persons, that does not justify you in asking us to give a direction which will enable you to exercise that general power for your own benefit." We are not concerned with the position of any person who can say he has advanced money without notice of any obligation on the part of the tenant for life in respect of raising the interest. Such person would be entitled to have his position considered. But a tenant for life is not entitled to come and ask for an order.

It is said that our decision will cast doubts upon the title of

banks or insurance companies who are in the habit of lending money for the payment of estate duty and interest upon the security of the estate. Now I am by no means sure that a person can safely lend money to a tenant for life upon the security of a charge upon the inheritance expressly to enable him to pay the interest on estate duty. If the tenant for life in effect says to such person, "I am tenant for life, and I want to borrow the money upon the security of a charge made by me upon the inheritance for a purpose which as between tenant for life and remaindermen is improper," the person lending the money upon such a security would not have a good title. I would say further, that if a person advanced money without notice, so that he would be entitled to say he had a good charge for the amount of interest as well as of principal, then the remaindermen would be entitled to require the tenant for life, so far as he had improperly raised money for the interest which he ought himself to have paid, at once to indemnify the estate. The result, therefore, is, that this tenant for life is asking us to decide that he is entitled to exercise the power in his own favour, while, if he were to exercise it himself without coming to the Court, he would have to indemnify the estate at the instance of the remainderman. He has no right to come here and ask for any such general direction.

In my opinion the decision of Buckley J. was right, and this appeal must be dismissed.

COZENS-HARDY L.J. I am of the same opinion, and will add only a few words.

The question is, What are the rights of a tenant for life who pays estate duty? They are defined by s. 9, sub-s. 6, which says that "a person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him." In other words, he is to have a charge of the same nature and to the same extent as if a mortgage of the estate had been given him by the executor under sub-s. 5.

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How can it be said that a tenant for life finding money for the payment of the instalments of estate duty can, under sub-s. 6, take a mortgage not only for the instalments, but also for money which he ought to keep down himself? That, it seems to me, reduces the contention to an absurdity. The tenant for life cannot under that sub-section himself get a charge in respect of any interest which he ought to have paid. Can it then be said that he is able to give to a stranger a charge greater than that which he himself would have been entitled to? I do not think so. The stress of the argument rests upon sub-s. 5, which enables a tenant for life to raise by sale, mortgage or charge not only the duty, but also "any interest and expenses properly paid or incurred by him in respect thereof." It is suggested that those words would be well satisfied by treating them as referring to a person who, not being under a personal liability to pay, is authorized to pay the duty, and may, therefore, be well entitled to say, "I have nothing to do with the limitations of the settlement: I have paid the Crown and insist on receiving back the whole money and interest." But it seems to me also that the words "interest properly incurred" may have reference to some part of the Act as amended by the Act of 1896. Looking at sub-s. 6 of s. 6 of the Act of 1894, the section providing for the collection and recovery of estate duty, we find it provided that interest at 3 per cent. on the estate duty shall be paid from the date of the death up to the date of the delivery of the Inland Revenue affidavit or account, or the expiration of six months after the death, whichever first happens, "and shall form part of the estate duty." These latter words were struck out by Part III. of the schedule to the Finance Act, 1896, but it is possible that the words "properly paid," in s. 9, sub-s. 5, of the Act of 1894 may refer to interest paid under s. 6, sub-s. 6, for the period there mentioned, which interest was thereby made "part of" the capital of the estate duty, and, that being so, might reasonably be raised by mortgage. I observe that North J. is reported to have held in *Re Fish* (1) that interest for the period mentioned in that sub-section was payable out

(1) 103 L. T. Journ. 267.

of capital; so that there is to be found at least one instance in which interest on estate duty might have become payable out of capital.

Then s. 8, sub-s. 10, of the Act of 1894 says that "interest on arrears of estate duty shall be paid as if they were arrears of legacy duty." That again is repealed by s. 18 of the later Act, which provides, by sub-s. 1, that simple interest at 3 per cent. shall be payable upon all estate duty from the date of the death, or, where the duty is payable by instalments, or becomes due at any date later than six months after the death, from the date at which the first instalment or the duty becomes due, and shall be recoverable in the same manner as if it were part of the duty. But the words of s. 8, sub-s. 10, of the former Act would seem to justify one in saying that interest on arrears of estate duty was part of the capital, and therefore raisable under s. 9, sub-s. 5. However, in consequence of the repeals I have mentioned, it is impossible now to say that either under s. 6, sub-s. 6, or under s. 8, sub-s. 10, the interest there referred to forms part of the capital of the estate duty and is raisable as such. I am, therefore, of opinion that the view taken by Buckley J., and by the Master of the Rolls and Romer L.J., of sub-s. 5 of s. 9 is right.

It seems contrary to all principle to allow a tenant for life to charge upon the estate interest which by the language of the Act and by the policy of the law is payable by himself. If any case of hardship arises in consequence of a tenant for life being called upon to pay the interest on estate duty, an appeal must be made, not to the language of the Act, but to the general jurisdiction of the Court; but except in cases of that kind, I am clearly of opinion that a tenant for life cannot avail himself of the general power of charging given by the Act by exercising it for his own benefit.

I agree therefore in thinking that this appeal must be dismissed.

Solicitors: *Trower, Still, Freeling & Parkin.*

G. I. F. C.

C. A.
1903
April 27, 28.

In re BRYDONE'S SETTLEMENT. COBB *v.* BLACKBURNE.

[1902 B. 4170.]

Marriage Settlement—Construction—Ultimate Trust of Wife's Property—Die "without having been Married."

Wilson v. *Atkinson*, (1864) 4 D. J. & S. 455, must not be taken to have laid down as a general rule that, in the ultimate trust of the wife's property contained in a marriage settlement for the wife's statutory next of kin as if she had died intestate and "without having been married," the words must always be construed so as not to exclude issue of the wife.

The view of *Wilson* v. *Atkinson* expressed by Jessel M.R. in *Emmins* v. *Bradford*, (1880) 13 Ch. D. 493, and by Swinfen Eady J. in *In re Smith's Settlement*, [1903] 1 Ch. 373, adopted, and the contrary view expressed by Fry J. in *Upton* v. *Brown*, (1879) 12 Ch. D. 872, by Chitty J. in *Stoddart* v. *Saville*, [1894] 1 Ch. 480, and by Kekewich J. in *In re Mare*, [1902] 2 Ch. 112, disapproved.

The words in question ought primâ facie to be construed according to their natural meaning, which would exclude issue of the wife, unless there be something in the context or in the circumstances of the case which shews that the words were not intended to bear that meaning.

By a settlement made on the marriage of a spinster a fund belonging to her was vested in trustees, upon trust to pay the income to her during the joint lives of herself and her husband, and after the death of either of them to pay the income to the survivor during his or her life, and after the death of the survivor to hold the fund in trust for the child or children of the marriage as the husband and wife should by deed jointly appoint, and in default of appointment as the survivor should by deed or will appoint, and in default of appointment in trust for the children of the marriage equally who being sons should attain twenty-one, or being daughters should attain twenty-one or marry. If there should be no child, who being a son should attain twenty-one, or being a daughter should attain that age or marry, then, without prejudice to the prior trusts, if the wife should die before the husband, the trustees were, after his death and such default or failure of children, to hold the fund upon such trusts as the wife should by will appoint, and in default of appointment upon trust for the persons who would have been entitled thereto as her statutory next of kin at her death "if she had died possessed thereof intestate and without having been married."

The marriage took place in 1870. The wife died in 1871, intestate, leaving twin infant children, who both died a few months after their

mother. In 1901 the husband died. No appointment had been made under the powers contained in the settlement:—

Held, that the sole statutory next of kin of the wife at the time of her death (excluding the infant children) was entitled to the fund.

Decision of Kekewich J. reversed.

APPEAL from a decision of Kekewich J.

The question was as to the construction of the words "died possessed thereof intestate and without having been married" in the ultimate trust declared in a marriage settlement of a fund brought into settlement by the wife.

In June, 1870, H. G. Brydone married Sophia Marianne Crofton, a spinster.

In contemplation of the marriage, and shortly before it took place, a settlement dated June 8, 1870, was executed. By this deed a fund provided by the husband, and another fund, called the "Crofton Trust Fund," provided by the wife, were vested in trustees, upon trust during the joint lives of the husband and wife to pay the income to the wife, for her separate use without power of anticipation, and after the decease of either of them to pay the income to the survivor during his or her life, and after the decease of such survivor to hold the trust funds and the income thereof in trust for the child or for all or any such one or more of the children of the marriage as the husband and wife should by deed jointly appoint; and in default of such appointment, and so far as no such appointment should extend, as the survivor of the husband and wife should by deed or will appoint; and in default of any such appointment, and so far as no such appointment should extend, in trust for all the children or any the child of the marriage, who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, and, if more than one, in equal shares. Then followed powers for the advancement and maintenance of the children, and then it was declared that "if there shall be no child of the said intended marriage who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then (without prejudice to the trusts hereinbefore declared) and from and

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after the decease of the said Sophia M. Crofton, and such default or failure of children as aforesaid," the trustees should hold the husband's fund on trust for him, and, "as to the 'Crofton Trust Fund' and the income thereof, the trustees shall hold the same, or so much thereof respectively as shall not have become vested or been applied under any of the trusts, powers, or provisions herein contained, upon the trusts following (that is to say), if the said Sophia M. Crofton shall survive the said H. G. Brydone then, after his decease and such default or failure of children as aforesaid, in trust for the said Sophia M. Crofton, but if the said Sophia M. Crofton shall die in the lifetime of the said H. G. Brydone then, after his decease and such default or failure of children as aforesaid, upon and for such trusts, intents, and purposes as the said Sophia M. Crofton shall, notwithstanding coverture, by will or codicil appoint, and in default of such appointment, and so far as no such appointment shall extend, in trust for such person or persons as, under the statutes for the distribution of the effects of intestates, would have become entitled thereto at the decease of the said Sophia M. Crofton if she had died possessed thereof intestate and without having been married, such persons, if more than one, to take as tenants in common in the shares in which they would have been entitled under the same statutes."

On April 22, 1871, the wife died intestate, having just previously given birth to twins.

These children died about eight months after their mother. In October, 1872, H. G. Brydone married again. On December 26, 1901, he died, having made a will.

No appointment had been made under the powers contained in the settlement.

This summons was taken out by the trustees of the settlement, as plaintiffs, against the sole next of kin of the first wife and the executor of H. G. Brydone, as defendants, asking the determination by the Court of the question whether the Crofton Trust Fund belonged to the next of kin of the first wife or to the legal personal representative of the deceased infant children.

Kekewich J. held that the husband, as legal personal representative of his deceased infant children, was entitled to the fund, they being the next of kin of their mother. In so holding the learned judge simply followed, without argument, his own previous decision in *In re Mare* (1), in which he had decided that similar words in a marriage settlement must be construed as intended to exclude the husband, but not to exclude children of the marriage. The learned judge thought that a general rule to that effect had been laid down by the Court of Appeal in *Wilson* v. *Atkinson* (2), and that he was bound to follow it.

The next of kin of the first wife appealed.

Warrington, K.C., and *Joseph Tanner*, for the appellant. It is contended that the natural meaning ought to be given to the words, and that meaning would exclude the children, for if the wife had not been married she could not legally have had any children. It is submitted that the learned judge was wrong in supposing that such a general rule had been laid down in *Wilson* v. *Atkinson*. (2) The real basis of that decision was the existence of a peculiar clause in the settlement, namely, a proviso that for the purpose of the ultimate trust an illegitimate child of the wife should be deemed to be a lawful child. That necessarily implied that children were to be included in the class of next of kin of the wife. This view of *Wilson* v. *Atkinson* (2) was taken by Jessel M.R. in *Emmins* v. *Bradford* (3), in which it was held that similar words operated to exclude children of the wife by a former marriage, there being no children by her second marriage. In *Clarke* v. *Colls* (4) the word used was simply "unmarried"; but Lord Cranworth clearly intimated that, if the words had been "without having been married," the children of the marriage would have been excluded. It is true that in *In re Ball's Trust* (5) and in *Upton* v. *Brown* (6) Fry J. took a different view; but in both those cases he thought that he was following

(1) [1902] 2 Ch. 112.
(2) 4 D. J. & S. 455.
(3) 13 Ch. D. 493.
(4) (1861) 9 H. L. C. 601, 612.
(5) (1879) 11 Ch. D. 270.
(6) 12 Ch. D. 872.

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a general rule laid down in *Wilson* v. *Atkinson*. (1) And it is evident that in *In re Ball's Trust* (2) he would have decided differently had he not thought that he was bound by authority. In the present case it is expressly provided in the direct trust for children that the only children to take in default of appointment are sons who attain twenty-one and daughters who attain twenty-one or marry, and it is unreasonable to suppose that it was intended that infant children should take under the ultimate trust. In *Emmins* v. *Bradford* (3) Jessel M.R. expressly declined to follow *Upton* v. *Brown*. (4) In two Irish cases the Irish Master of the Rolls took the same view of *Wilson* v. *Atkinson* (1) as was taken by Jessel M.R.: *Hardman* v. *Maffett* (5); *In re Deane's Trusts*. (6) And in the recent case, *In re Smith's Settlement* (7), Swinfen Eady J., in a carefully considered judgment, reviewed the authorities and followed *Emmins* v. *Bradford*. (3) It is true that in *Stoddart* v. *Saville* (8) Chitty J. came to a different conclusion. But in that case there was no direct trust for the children of the marriage, though the wife had a general power of appointment. And, moreover, the learned judge thought that a general rule had been laid down in *Wilson* v. *Atkinson*. (1) He also followed a decision of Stirling J. in *In re Arden's Settlement*. (9) But that decision was really founded on *Wilson* v. *Atkinson* (1) and *Upton* v. *Brown*. (4) Moreover, *In re Arden's Settlement* (9) was a very peculiar case, and great hardship would have resulted from a contrary decision. In *In re Forbes* (10) Romer J. followed *Stoddart* v. *Saville* (8), *In re Ball's Trust* (2), *Upton* v. *Brown* (4), and *In re Arden's Settlement*. (9) But the case is very shortly reported. There the settlement was made on the marriage of a widow who had one child by her first marriage. There was no child of the second marriage. It was held that under the ultimate trust for the statutory next of kin of the wife, "as if she had died a spinster and intestate," the child of the first marriage was entitled to the

(1) 4 D. J. & S. 455.
(2) 11 Ch. D. 270.
(3) 13 Ch. D. 493.
(4) 12 Ch. D. 872.
(5) (1884) 13 L. R. Ir. 499.
(6) [1900] 1 I. R. 332.
(7) [1903] 1 Ch. 373.
(8) [1894] 1 Ch. 480.
(9) W. N. (1890) 204.
(10) W. N. (1899) 6.

fund as next of kin of the wife. *In re Mare* (1) seems to be the only case in which the words "without having been married" contained in a settlement made upon the marriage of a spinster have been construed as not excluding children of the marriage. For the purpose of excluding the husband those words are unnecessary, because a husband does not take as next of kin of his wife under the Statute of Distributions. It is submitted that there is nothing in the present case to prevent this Court from giving to the words their natural meaning, and that there is no authority which compels the Court to adopt an artificial construction.

Haldane, K.C., and *Dighton Pollock*, for the husband's executor. It is submitted that in *Wilson* v. *Atkinson* (2) the Court of Appeal laid down a general rule which binds this Court. The existence of the rule has been recognised in many of the cases which have been cited. If this rule is not followed, the result might be that in such a settlement as this, if a son married under twenty-one and died under twenty-one, leaving issue, there would be no provision for the issue.

[ROMER L.J. The mother has a power of appointment.

COZENS-HARDY L.J. What better form of words could be adopted for the purpose of excluding children?]

It might have been said, "without at the time of her death having the status of a married woman and leaving children." In the case of a marriage settlement there is a very strong presumption that it is intended to provide for the issue of the marriage rather than for remote collaterals.

In *Clarke* v. *Colls* (3) Lord Cranworth, in answer to the suggestion that there was a power in the settlement which would have enabled the wife to provide for the issue of a second marriage, if there should be no issue of the first who should become entitled to the fund, said: "She might never exercise that power, and I cannot believe that she could have intended to give her property in any event to her collateral relatives in preference to her own children by a second marriage."

(1) [1902] 2 Ch. 112. (2) 4 D. J. & S. 455.
(3) 9 H. L. C. 601, 614.

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The existence of this presumption is recognised in many of the cases. In *Stoddart* v. *Saville* (1) Chitty J. considered that a general rule had been laid down by *Wilson* v. *Atkinson.* (2)

[COZENS-HARDY L.J. In *Stoddart* v. *Saville* (1) there was no provision for children except by means of a general power of appointment.]

In the present case there is no express exclusion of issue of the wife in the ultimate trust; but words are used which, if taken literally, would exclude children of a child. But there is in the case of a marriage settlement the strong presumption already referred to, and it is submitted that the object of the words in question is to prevent the consequence which would follow from the wife having the status of a married woman, but not to exclude issue of the marriage. There is a long series of decisions in favour of this interpretation of the words. *In re Watson's Trusts* (3) is another decision to the same effect. And in the present case the fact that the special power of appointment is limited to children of the marriage and does not extend to issue strengthens the presumption.

VAUGHAN WILLIAMS L.J. In my judgment, we must in this case give to the words "without having been married" their natural meaning. It has been argued that we ought not to do so, because when you are dealing with such an instrument as a marriage settlement there is a presumption that the parties intend to benefit the issue of the marriage, and that that presumption is so strong that it compels us to construe these words differently from their natural meaning—a presumption so strong that it binds us to construe "nunquam nupta" as if it were simply "innupta." I cannot agree to that. It seems to me obvious that Lord Cranworth did not in *Clarke* v. *Colls* (4) recognise the existence of any such powerful presumption. The clause, somewhat similar to the present clause, which occurred in the settlement in that case contained the word "unmarried," not the words "without having been married." But Lord Cranworth in dealing with the construc-

(1) [1894] 1 Ch. 480.
(2) 4 D. J. & S. 455.
(3) (1886) 55 L. T. 316.
(4) 9 H. L. C. 601.

tion of the word "unmarried" said (1): "What is the meaning of the word 'unmarried'? It may, without any violence to language, mean either 'without ever having been married,' or 'not having a husband living at her death.' If the former construction be adopted, then, if the wife should survive her husband, and afterwards marry and have children, her collateral relatives would take the fund to the exclusion of her own issue. If the latter construction be adopted, no such result will follow." It is plain that Lord Cranworth would not have expressed himself thus if he had not thought that, if such a clause in a marriage settlement contained these words, "without ever having been married," the result would be that the collateral relatives would take the fund to the exclusion of the wife's own issue. It seems to me, therefore, that the suggested presumption was not recognised by Lord Cranworth. But it is said that the presumption was recognised in *Wilson* v. *Atkinson*. (2) As a matter of fact there were in that case special circumstances which clearly justified the conclusion at which the Court arrived, without having recourse to any such presumption. But it is said that Knight Bruce and Turner L.JJ. in their judgments recognised the existence of the presumption, because Turner L.J. said (3) that "even if it be necessary to construe the terms of the trust for the next of kin independently, and without qualifying them by the subsequent declaration, still in my judgment the trust for the next of kin ought not to be so construed as to exclude children," and that in either view the illegitimate child was entitled to the fund. Of course, if it could be shewn that the Court of Appeal did in *Wilson* v. *Atkinson* (2) recognise that presumption, and did say that in all cases of construction of a marriage settlement, and especially in the construction of a clause for the ultimate distribution of the wife's property in favour of her next of kin as against her issue, whatever the words used might be, they ought not to be construed so as to exclude the issue of the marriage, we should be bound by that decision and must follow it. I do not forget that Chitty J. in *Stoddart* v. *Saville* (4)

(1) 9 H. L. C. 612.
(2) 4 D. J. & S. 455.
(3) 4 D. J. & S. 461.
(4) [1894] 1 Ch. 480.

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considered that *Wilson* v. *Atkinson* (1) had laid down such a general rule, and that it was decided by both the Lords Justices upon the basis of the supposed presumption. Notwithstanding that view of Chitty J., which was certainly more or less shared by Fry J., I do not think we ought to regard *Wilson* v. *Atkinson* (1) as having recognised that presumption. It was really unnecessary in that case to go that length. Both the Lords Justices evidently thought that the circumstances, and in particular the declaration with reference to the illegitimate child of the wife, fully justified the conclusion at which they arrived, without relying upon any such presumption. It seems to me, therefore, that we are left at large in the present case, and that it is not true that there is any presumption which binds us never to give to any words in a marriage settlement a construction which will result in the exclusion of the issue. On the contrary, it seems to me that in each case the Court must look at that which is within the four corners of the settlement, and see whether there is anything in the context or in the circumstances of the case which will justify it in departing from the natural and plain meaning of the words used. I do not mean that in construing a marriage settlement the Court will not more easily arrive at a construction which gives the children of the proposed marriage the benefit of the settlement than one which excludes them, but I cannot accede to the contention of Mr. Haldane that there is a presumption so powerful as to override the words, whatever they may be, in case their natural construction would exclude the children.

Although, in consequence of the arguments which have been addressed to us, I have thought it right to go at length into this matter, and in particular to consider the effect of the decision in *Wilson* v. *Atkinson* (1), I am not sure that in the present case there is any need to do so, because here not only do we not find in the context anything to assist us in adopting a construction which would not exclude the children, but, on the contrary, looking at the settlement as a whole, there is everything to lead to the conclusion that there was no intention that the issue should take any benefit under it other than that

(1) 4 D. J. & S. 455.

particular provision which is made for them—a provision under which these children who died in infancy could have taken no benefit whatever. If the cases in which it has been held that children were not excluded are carefully examined, whatever may have been said generally in the judgments, yet when you look at the particular circumstances of each case I think you will always find in the particular settlement something which of itself naturally led to the conclusion that it could not have been the intention to exclude the children. Sometimes, as in the present case, an actual provision was made for the children; but in other cases there was a settlement in which there was no provision whatever for the children, and that, of course, is a circumstance which must be taken into consideration in dealing with the question whether such words as these are to be construed so as to exclude the issue of the marriage from all benefit under the settlement.

Under these circumstances I do not propose to go through in detail the decisions which are upon the same lines as the judgment which I am now delivering. It is sufficient to say that in one case Jessel M.R., and in two other cases the Master of the Rolls in Ireland, took the same view as that which is the basis of my present judgment.

I am far from saying that Kekewich J., having regard to such previous decisions as that of Chitty J. in *Stoddart* v. *Saville* (1) and the two decisions of Fry J. which have been cited, was not justified in following them. But, be that how it may, I do not think this Court is in any way bound by those decisions, and we must decide the present case according to our own view of the law.

In my judgment there is here nothing in the context or in any presumption which would justify us in giving to the words in question any other than their natural meaning. And in so doing we are in my judgment following the almost express decision of Lord Cranworth in *Clark* v. *Colls*. (2) I think, therefore, that the appeal ought to be allowed.

ROMER L.J. I have come to the same conclusion. I am bound to say that I can see no ambiguity in the words on

(1) [1894] 1 Ch. 480. (2) 9 H. L. C. 601.

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Romer L.J.

which the question turns. To my mind the words are clear in themselves, and I think they should receive their ordinary meaning, unless there is something in the instrument as a whole which would justify us in departing from that meaning. I can find nothing in this settlement to justify us in so doing. It may be conceded that in ordinary marriage settlements there is a presumption that the children of the marriage were to be properly benefited thereunder, and it may well be, and I do not doubt, that in cases in which no provision, or an obviously inadequate provision, is made for the children, it may be said that it would be unreasonable to give to such words as those with which we are dealing their ordinary meaning, and accordingly the Court might in such cases be justified in giving to the words a different meaning. But in the present case there appears to me to be a clear and adequate and proper provision made for the children, and I can see no sufficient reason in the circumstances or in the context of the settlement which would justify the Court in refusing to give to the plain words their ordinary and proper meaning.

As regards the authorities, I need only say that in my opinion there is no authority binding on this Court which compels us to say that there is a hard and fast rule that in all marriage settlements the words "die without having been married" in such a clause as the present must receive an artificial or special construction, and not their ordinary and natural meaning. In fact, in the present settlement I cannot help thinking that, if we did not give to the words in question their ordinary and proper meaning, we should not be carrying out the true intention of the parties as expressed and appearing in the settlement. When you find, as in this settlement, such a careful provision for the shares of the children becoming vested, as to sons at twenty-one and as to daughters at twenty-one or marriage, it could not, I think, have been contemplated that, in default of any child attaining a vested interest under that trust, the father, claiming only in form through children who came into existence and died (as here) in mere infancy, should be able to take the fund which was settled by the mother. In my judgment, to give to the words in this settlement the meaning for

which the respondents contend would be contrary to the intention as appearing by the settlement itself.

Only one possible state of circumstances can be suggested as tending to shew that the provision made by this settlement for the issue of the marriage was in any respect not reasonable. It is said that the case of a son marrying under twenty-one, dying under twenty-one, and leaving issue is not provided for. But, in the first place, I may observe that such a state of things was not very likely to occur, and the circumstance that it was not fully and specially provided for would, in my opinion, afford no sufficient argument for refusing in the present case to give to the words with which we are dealing their proper meaning. But, further, I may point out that, if there had been another child who did attain a vested interest, a son who had married and died under twenty-one leaving issue would not have been entitled to any share in the settled fund. In my opinion it is clear that, for reasons which appeared to the parties to this settlement to be good and sufficient, it was deliberately not intended by them that a son marrying and dying under such circumstances should take any interest in the settled fund. And it may well be that they did not care to provide for that special case when dealing with the event of there being no child attaining a vested interest in the funds under the trust for children.

It appears to me, therefore, that in this settlement there is absolutely nothing to justify the Court in giving to the words in question any but their ordinary meaning, and, indeed, I think there is something which points in the opposite direction.

Under the circumstances, I need not go through the authorities. They have been dealt with, and, if I may say so, very well dealt with, by Swinfen Eady J. in *In re Smith's Settlement.* (1) I agree that it is not easy to say exactly what *Wilson* v. *Atkinson* (2) must be taken as having decided, except that the settlement was of a peculiar character, and that undoubtedly one of the grounds of the decision was the very peculiar circumstances of the case. How far Knight Bruce and Turner L.JJ. intended to express opinions not necessary

(1) [1903] 1 Ch. 373. (2) 4 D. J. & S. 455.

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for the decision of the case then before them I cannot say. But such expressions of opinion could not bind this Court, or prevent us from deciding the present case in accordance with the views which appear to us to be right and just. Having said this, I think it is unnecessary for me to go further into the cases. In my judgment the appeal must succeed.

COZENS-HARDY L.J. I agree. The case is important, because it arises upon the construction of a common form clause in a marriage settlement.

On the construction of this particular clause I doubt whether, apart from authority, any person in Court would hesitate as to its meaning. It seems to me almost too plain for argument that the fund is to go to an artificial class of persons to be ascertained on the footing that the lady never had been married, but had remained a spinster all her life. It is said, however, that principles have been laid down by authorities which bind us to put a non-natural interpretation upon these words. I can find no principle laid down by either the Court of Appeal or the House of Lords which prevents us from giving effect to that which seems to me the plain meaning of the words. On the contrary, I think *Clarke* v. *Colls* (1), which is the only case in the House of Lords, is really a strong decision in favour of the appellant. That case turned upon the construction of a clause similar to the present clause, except that the word used was "unmarried," and it was pointed out that the word "unmarried" was a word of dubious import, that it might mean either "spinster" or "widow," and that, taking it to include the latter, there was no reason why children who had not attained a vested interest should not take under the limitation to next of kin of the wife as if she had died unmarried. But Lord Cranworth, who with Lord Campbell formed the majority of the Lords, expressly said that the result would have been different if the words had been those which are found in the present settlement. As to *Wilson* v. *Atkinson* (2), it has been so fully discussed by my brother Vaughan Williams L.J. that I need not say more

(1) 9 H. L. C. 601. (2) 4 D. J. & S. 455.

than this, that the decision itself was plainly correct—indeed, I should have thought that the case was barely arguable. I agree with the view taken by Jessel M.R. in *Emmins* v. *Bradford* (1) that *Wilson* v. *Atkinson* (2) did not lay down any general principle by which the Court would be bound in construing any other document. I adopt the judgment of Jessel M.R. in *Emmins* v. *Bradford* (1), and the judgments of the Irish Master of the Rolls in the two cases which have been cited, and also the very recent judgment of Swinfen Eady J. in *In re Smith's Settlement.* (3) No doubt there might be a context which would force the Court to give a different meaning to these words, and such a context was found in *Wilson* v. *Atkinson.* (2) It is not necessary now to say what context would or would not be sufficient for that purpose. I do not wish to decide absolutely what might have been the effect if there had been no provision at all for children in this settlement, although as at present advised I do not think that would have made any difference. But, if a context is required to justify the construction which we are adopting, I find it here in terms which satisfy me completely. The plain intention, as it seems to me, was that the provision actually made in the prior part of the settlement for the children of the marriage was all that was intended to be made for the issue of the marriage. The trust with which we are dealing was to become operative only in the event of there being no child who should attain twenty-one, or, if a daughter, should marry; and it would indeed be strange if the effect of the subsequent limitation was to give to children who did not take any vested interest under the prior trust an absolute interest in the fund.

For these reasons I think that the judgment of Kekewich J. must be reversed, and an order made in the terms of the notice of motion.

Solicitors: *Bower, Cotton & Bower, for Mayo & Son, Yeovil; Quayle & Ouvry; Williamson, Hill & Co., for Charlewood & Chesney, Manchester.*

(1) 13 Ch. D. 493. (2) 4 D. J. & S. 455.
(3) [1903] 1 Ch. 373.

W. L. C.

C. A.
1903
April 29.

MERCIER *v.* MERCIER.

[1902 M. 1812.]

Husband and Wife—Purchase in name of Husband—Payment out of Wife's Property—Resulting Trust—Presumption—Evidence—Capital or Income.

In 1883 the defendant married Colonel Mercier. They kept a joint banking account almost entirely composed of the wife's income, and both husband and wife drew on this account. In 1891 they bought some land, which was paid for out of the joint account and was conveyed to the husband. He died intestate in 1901, and his heir-at-law claimed the land:—

Held (affirming the decision of Buckley J.), that Mrs. Mercier had not made a gift of the purchase-money to her husband, and that the land belonged to her.

Per Romer and Cozens-Hardy L.JJ.: There is no distinction in principle between the presumption of a resulting trust in favour of the wife which arises when her income has been applied to a purchase in her husband's name and that which arises when the payment has been made out of her capital.

Alexander v. *Barnhill*, (1888) 21 L. R. Ir. 511, explained.

Appeal from Buckley J.

In 1883 the defendant in this action, who was entitled to a considerable amount of property, married Colonel Mercier, who was almost without means. Shortly after the marriage they gave up keeping two separate banking accounts, and from that time forward kept only a joint account, on which both husband and wife drew. This account comprised all the income which belonged to the wife, and also some small sums which belonged to the husband. On November 5, 1891, Colonel and Mrs. Mercier bought for 1310*l.* a piece of land near Bournemouth as a site on which to build a house. It was stated that the deposit was paid by a cheque drawn by Colonel Mercier on the joint account in favour of the vendors; and that in order to pay the balance he drew a cheque to "Self," cashed it, and handed the proceeds to the vendors. The land was conveyed to Colonel Mercier in fee simple, and his wife was not a party to the conveyance.

They opened a building fund account in their joint names,

which was almost entirely composed of the wife's money and mainly of capital; and out of this fund a house was built on the land. Colonel Mercier died in June, 1901, intestate. His widow was his administratrix, and alleged that the land and house belonged to her as having been paid for out of her money.

Colonel Mercier's heir-at-law brought this action against her, claiming a declaration that the property formed part of Colonel Mercier's estate, and an order that the widow as administratrix should convey it to him. She insisted that she had not given to her husband the money spent on the property, and that he was a trustee of it for her, and she counter-claimed a declaration that she was beneficially entitled to it.

Buckley J. dismissed the action with costs, and made a declaration in the terms of the counter-claim.

The heir-at-law appealed.

Butcher, *K.C.*, and *E. Ford*, for the appellant. If property is purchased in the name of the husband out of capital money belonging to the separate estate of the wife, there is a presumption of a resulting trust in favour of the wife; and that presumption may be rebutted by oral evidence shewing that it was a gift by her to him. If the property is purchased by the husband out of income belonging to the wife no presumption arises that the property belongs to the wife, and oral evidence is not admissible to shew that a trust exists. In this case the joint account consisted of income, so no presumption arose; and no oral evidence is admissible except to shew from what source the money was derived, whether from capital or income.

[ROMER L.J. All the surrounding circumstances may be evidence to rebut or support the presumption. The question here is whether there was a gift of the purchase-money to Colonel Mercier: *Dyer* v. *Dyer*. (1)]

If the husband buys land with the wife's income she cannot set up by parol evidence a resulting trust in her own favour.

[VAUGHAN WILLIAMS L.J. referred to Taylor on Evidence, 9th ed. p. 665.]

(1) (1788) 2 Cox, 92; 2 W. & T. 7th ed. pp. 803, 819; 2 R. R. 14.

C. A.
1902
KEKEWICH J.
Dec. 12.
C. A.
1903
April 30.

In re COLEY.
HOLLINSHEAD *v.* COLEY.

[1902 C. 3940.]

Will—Construction—"Wife" of a Person, Gift to for Life—Wife living at Date of Will—Second Wife, whether included—Persona Designata.

A testatrix gave her residuary estate to trustees to pay the income to her son for life, and after his decease to "his wife" for her life, with remainder, as to the capital, for such of "his children" as should attain twenty-one equally.

At the date of the will the son had a wife living and well known to the testatrix. The wife died after the testatrix and the son married again:—

Held, that the word "wife" must bear its primâ facie meaning, as referring to the wife existing at the date of the will, there being no context to control that primâ facie meaning; and consequently, that on the death of the son his second wife took no interest under the gift.

Re Burrow's Trusts, (1864) 10 L. T. 184, approved.

In re Lyne's Trust, (1869) L. R. 8 Eq. 65, disapproved.

Ann Coley, widow, by her will dated January 12, 1869, after appointing two trustees and executors, and making certain bequests, devised and bequeathed all her real and the residue of her personal estate to her trustees upon trust for sale and conversion and for investment of the proceeds. And after declaring trusts of 600*l*., part of such proceeds, for a sister and certain nieces, as to the residue of her said real and personal estate, she directed her trustees to pay the income thereof to her son, William Coley, for his life, "and from and after his decease to pay the same into the proper hands of his wife for her life, if she shall continue his widow, and she shall not anticipate, charge, or incumber the same; and from and after her decease or second marriage, whichever shall first happen, I direct the trustees and trustee for the time being hereof to divide the said principal moneys and all other, if any, my residuary estate unto and among such of his children as shall live to attain the age of twenty-one years equally, share and share alike," each child to have a vested interest at twenty-one or on death leaving issue surviving; but if her said son

should die without leaving issue, the testatrix directed the trustees, "after the decease or second marriage of his said widow," to divide the whole of her said residuary estate among such of her (the testatrix's) nephews and nieces as should be living at her (the testatrix's) death and should attain twenty-one, or die under that age leaving issue surviving, equally, share and share alike. And the testatrix declared that it should be lawful for her trustees, "after the decease or second marriage of any legatee entitled for life or during widowhood, whichever shall first happen," and during the minority of any grandchild, nephew, or niece, to apply the interest of his or her presumptive share in the said principal moneys towards his or her maintenance and education; and that all surplus interest not so applied should be invested and accumulated for the benefit of the grandchild, nephew, or niece from whose portion the same was saved. And the testatrix also declared that it should be lawful for her trustees, "after such decease or second marriage," or prior thereto if they deemed it advisable, to advance any part, not exceeding one-half, of the presumptive share "of any or either of the same child or children" towards his or her advancement in the world.

The testatrix died on August 16, 1870. Her estate was duly converted and got in, and her net residuary estate now consisted of certain mortgage debts and shares.

William Coley, who was her only son, on July 24, 1861, married one Mary Simons. She was well known to the testatrix and survived her, and she died on February 12, 1899. There was no issue of the marriage.

On October 12, 1899, William Coley married one Lizzie Poole, and on August 28, 1902, he died, without issue.

The testatrix, Ann Coley, had living at her death several nephews and nieces, all of whom attained twenty-one.

On the death of William Coley the question arose whether his widow, Lizzie Coley, took a life interest under the will; and to have this question decided, the surviving trustee of the will took out an originating summons against her and also one of the nieces of the testatrix, who was ordered to represent all the persons interested in the capital of the residuary estate,

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asking whether, according to the true construction of the will, and in the events which had happened, the defendant, Lizzie Coley, was entitled to a life interest in the residuary estate; and, if necessary, administration.

The summons was heard by Kekewich J. on December 12, 1902.

R. J. Parker, for the trustee in support of the summons.
Nepean, for the widow.
Mark Romer, for the residuary legatees.

KEKEWICH J. It is impossible to say that this question is settled by authority. The gift in this case is to pay after the death of the son the income into the proper hands of his wife for her life. The construction of such a gift is governed by a rule of law which is admittedly established, and which I will read from the judgment of Stirling J. in *In re Drew* (1): "As regards the rule of law, the proposition which is admitted in this case is that primâ facie where the wife of a person is spoken of by a testator, and that person is married at the date of the will, in the absence of any context, the wife existing at the date of the will is the person intended to take." Therefore, stopping there, I must take it that, whatever the testatrix really intended, the proper construction of her words is that the income is to go to her son's then wife, if, of course, she survived him. It is quite impossible to get out of that. Reliance is, however, placed upon these words, "if she shall continue his widow." It is said that the testatrix is pointing to the person who will be the widow of her son. The answer is, of course, that it is a gift to the wife after the death of her husband, that is to say, to the wife if she becomes his widow and not otherwise, and the limitation of the interest durante viduitate adds nothing. I cannot see in these words anything to rebut the ordinary rule. Then she says, "after the decease or second marriage of his said widow." That, as it seems to me, carries it no farther. Then there is a power of maintenance, which is to be exercised after the decease or

(1) [1899] 1 Ch. 336, 339.

second marriage of any legatee entitled for life or during widowhood. What I have said before about the other disposition applies exactly to that. The gift after the death of the son's wife is unto and among such of his children as shall live to attain twenty-one, not among the children "by his present wife," but "his" children. The testatrix therefore contemplated, or must be taken to have contemplated, that he might have children by another wife, and that they would all take. There is a great deal to be said in favour of the argument that she clearly included in the ultimate gift the children of her son by any wife; and, therefore, she must be presumed to have intended that the wife whose life interest was to intervene between the son and the children might be an after-taken wife.

As to the authorities, the oldest case is *Boreham* v. *Bignall* (1), a decision given with great reluctance. Wigram V.-C. said he was never more persuaded that he was determining against the real intention of the testator, but he adopted the general rule, and did not find there any sufficient reason for extending the gift to a second wife. There he had some reason, which Malins V.-C. in the case of *In re Lyne's Trust* (2) thought a sufficient reason, for extending the meaning of the word "wife," but he thought, under the circumstances which he had to deal with, that was not sufficient. The gift there was to James Boreham "in such manner as to the trustees shall seem best, and to be and continue payable half-yearly during his natural life and from and after his decease, or in case he shall become bankrupt or insolvent, then I will and declare that the same annuity or yearly sum shall be paid and payable to the wife of him the said James Boreham, as some provision for the personal support of herself and of her husband and his children." If the rule of construction prevailed, as the Vice-Chancellor held it did, it must apply there not only to the wife, but also to the husband. It must mean the wife and her husband, that is to say, her husband at that time and his children, and yet the Vice-Chancellor thought he could not extend it to the surviving wife.

(1) (1850) 8 Hare, 131.

(2) L. R. 8 Eq. 65.

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(1) [1899] 1 Ch. 336, 339.

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(1) (1850) 8 Hare, 131. (2) L. R. 8 Eq. 65.

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Then the point came before Malins V.-C. in *In re Lyne's Trust.* (1) Stirling J. in *In re Drew* (2) regretted that *Re Burrow's Trusts* (3) was not called to the Vice-Chancellor's attention. There is also a decision of Sir George Jessel in *Firth* v. *Fielden* (4), in which he did not follow *In re Lyne's Trust.* (1) It is not for me to say that the decision in the last-mentioned case was wrong, but I think it is obviously open to criticism. Nor need I say any more now about the case of *Firth* v. *Fielden* (4) than that Sir George Jessel did in fact follow *Boreham* v. *Bignall.* (5)

The point came before Stirling J. in 1898, and was fully discussed by him, and I greatly regret that the learned judge did not see his way to determine the point which I have now to determine. There the context of the gift contained two elements. One was the exact one which we have here, that is to say, a gift to the son's children, and the other was a direction to the trustees to apply the income of the trust fund, in the event of the bankruptcy of the husband, for the benefit and maintenance of his wife and children. That, which existed in some other cases, is a very strong ground; because, looking forward to a possible bankruptcy, it is inconceivable that a testator would mean to say that if it happens to be another wife, and not the wife living at that time, she shall not be maintained when the husband has become bankrupt, although there is an ultimate trust for the maintenance of the wife for the time being. Stirling J. relied upon that. He had also this context, "and his children," and he states the rule of law as I have stated it, and refers to all the cases. Then at p. 341 he says: "I have to apply the rule to the case before me, and to say what is the effect upon my mind of the two elements which I have had to consider. The effect upon my mind is that the testator meant any wife of the son. Whether, in the conflicting state of the authorities, I should have come to that conclusion upon the first of the two elements, if it had stood alone, it is needless for me to say; but I do rely upon

(1) L. R. 8 Eq. 65.
(2) [1899] 1 Ch. 336, 340.
(3) 10 L. T. 184.
(4) (1874) 22 W. R. 622.
(5) 8 Hare, 131.

the mode in which the testator provides that the income is to be dealt with"; and then he goes on to deal with the provision in case of bankruptcy or alienation. On the whole I do not think that I am at liberty to decide against *Boreham* v. *Bignall* (1), followed by Sir George Jessel in *Firth* v. *Fielden* (2); and also *Re Burrow's Trusts* (3), decided by that extremely careful judge, Kindersley V.-C. On the authorities, therefore, I think it is my duty to hold that the wife living at the time was the only wife designated by this testatrix.

C. C. M. D.

The defendant Lizzie Coley appealed.

The appeal was heard on April 30, 1903.

Younger, K.C., and *Nepean*, for the appellant. We admit that if the gift to the son's "wife" is to be construed as a gift to a persona designata, there is an end of our case. But we submit, looking at the various clauses in the will, the testatrix was not providing for personæ designatæ at all. She was evidently providing for future children of her son, that is to say, his children by any wife. If so, it must be held that she could not have intended to leave the mother of those children without provision. The will, taken as a whole, points to this, that the testatrix was intending to provide for those, whether wife or children, who might stand in a family relation to her son and be dependent upon him. If so, there is nothing unreasonable in holding that she was intending to benefit the person who at her son's death should answer the description of his "widow." The learned judge seems to have decided this case against his own opinion, feeling himself bound by *Boreham* v. *Bignall* (1); but we submit that that case is really no authority against the learned judge's own view. The will is a different one from the present, and the reference there was clearly to the existing wife only. A similar case to the present, and one that is in conflict with *Boreham* v. *Bignall* (1), is *In re Lyne's Trust* (4), where Malins V.-C. held that the testator's son's second wife took, the ratio decidendi being

(1) 8 Hare, 131.
(2) 22 W. R. 622.
(3) 10 L. T. 184.
(4) L. R. 8 Eq. 65.

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that the testator meant to provide for the mother of any children his son might have. That decision, we submit, applies to this case. It is true Sir G. Jessel in *Firth* v. *Fielden* (1) seems to have followed *Boreham* v. *Bignall* (2) in preference to *In re Lyne's Trust* (3); but *Firth* v. *Fielden* (1) is very imperfectly reported, and it appears that in that case there was no gift to children. In *Longworth* v. *Bellamy* (4) a gift for the benefit of the "wife" of the testator's son, who was married at the time of the testator's death, was held to include a subsequent wife.

[ROMER L.J. *Re Burrow's Trusts* (5) is against you.]

It was clear on that will that the testator was referring to existing persons—personæ designatæ.

In *In re Drew* (6) the gift was held, upon the context, to include a second wife. So here, we submit that there is sufficient context to shew that the testatrix was not intending to confine the gift to the existing wife. In *In re Browne's Policy* (7), a policy taken out by a man for the benefit of his wife and children, he having a wife then living, was held to include a second wife.

[ROMER L.J. That is not the same as this case.]

Micklem, K.C., and *Mark Romer*, for the defendants, the residuary legatees, were not called upon.

R. J. Parker, for the plaintiff, the trustee of the will.

VAUGHAN WILLIAMS L.J. In my judgment the decision of Kekewich J. must be affirmed. I think that by the words used in this will the testatrix meant to describe the particular person who was the wife of her son both at the date of her will and at her death, and that she did not mean to refer to any one else who might stand in the relation of wife to her son. I do not think it can be contended but that where you have such a state of things as exists here, that is to say, where you have the wife who is mentioned living at the date of the will

(1) 22 W. R. 622.
(2) 8 Hare, 131.
(3) L. R. 8 Eq. 65.
(4) (1871) 40 L. J. (Ch.) 513.
(5) 10 L. T. 184.
(6) [1899] 1 Ch. 336.
(7) [1903] 1 Ch. 188.

and at the date of the death of the testator, then, primâ facie, if there is nothing in the context to negative it, the will must take effect as a whole and must be taken to refer to that particular wife. Of course, that primâ facie view may be negatived; and it has been said, I think, by Stirling J. when delivering judgment in *In re Drew* (1), that there is some conflict of authority on the point. I doubt myself whether there is any material conflict. You start with the primâ facie rule of construction, and if you have any case negativing that primâ facie rule of construction, then, no doubt, you have a conflict of authority; but there is no such case upon the question here. The conflict suggested is between *Boreham* v. *Bignall* (2) and *In re Lyne's Trust* (3); but it is not really a conflict of authority. You have in those two cases a certain similarity to each other—it may be a strong similarity; but you cannot say there is a conflict of authority when you see that in the case of one will a particular conclusion was come to, and in the case of another will very like it a different conclusion was come to. It seems to me that each case depends primâ facie upon the words of the particular will plus the surrounding facts in the particular case. I hope, therefore, that I am right in saying that, in arriving at a conclusion in this case, I am not seeking either to follow or not to follow any particular case in which a particular will has been under consideration.

Now I start with the general presumption that the testatrix is referring to her son's existing wife; but then I must see whether there is sufficient to displace that presumption. Mr. Younger put his argument in the only possible way in which, as it appears to me, it can be effectively put. He says that, if you look at the will as a whole, the guiding principle of the testatrix in making her will was this: "I must provide for those who will be dependent on my son, whether they stand in the relation of wife or of children: I must provide for those who stand in a family relation to my son—for those persons who after his death remain as members of his family." There are indications of some such scheme in her mind, but I do not

(1) [1899] 1 Ch. 336. (2) 8 Hare, 131. (3) L. R. 8 Eq. 65.

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think that is enough to justify us in refusing to give to the word "wife" that we have here its natural and primâ facie meaning.

Under these circumstances I agree with the decision of the learned judge, that "wife" in this case means the wife existing at the date of the will and of the death of the testator, and that the second wife cannot claim anything.

The appeal must therefore be dismissed.

ROMER L.J. I am of the same opinion. Personally I cannot see any difficulty in this case. It is settled that if in a will you find a gift by the testator to the "wife" of a person, and that person has at the time a wife living and acknowledged by the testator, the testator primâ facie intends to refer to the existing wife, and not to any subsequent wife that person may have; unless, indeed, there may be a sufficient context to enable the Court to say that the testator is referring also to a subsequent wife, and that the primâ facie meaning of the gift is displaced. But there must be a sufficient context to shew that. Is there such a sufficient context here? In my opinion there is not. You have a gift to the son for life, and after his death to the wife of the son during widowhood, and there was at the date of the will a wife of the son who was known to the testatrix; so that, primâ facie, she must be taken to be referring to that wife. Then, after the death of the son and the wife, there is a gift to the children of the son; that is to say, the gift of the corpus in remainder is not limited to the children by the existing wife, but extends to the children by any wife. In my opinion there is no sufficient reason for departing from the primâ facie meaning of the word "wife" in this gift. I cannot see why a testator should not wish to give a life interest to an existing person merely as the wife of another person, at the same time giving the corpus, after the death of that wife, to the children of that person by that or any other wife. To my mind, the two gifts are perfectly consistent one with the other, and there is no reason for giving to the word "wife" in the first gift any meaning different from its primâ facie meaning.

With regard to *Re Burrow's Trusts* (1), in my opinion that case was rightly decided.

In re Lyne's Trust (2) may be distinguishable in its circumstances from the present case, but I think it was not rightly decided, and that seems to have been the opinion of Sir G. Jessel in *Firth* v. *Fielden* (3), though, I agree, the report of that case is not satisfactory; but I gather that Sir G. Jessel hesitated to follow *In re Lyne's Trust.* (2)

In my opinion the decision of Kekewich J. is right, and the appeal must be dismissed.

COZENS-HARDY L.J. I agree. It seems to me that the principle to be applied to a gift of this kind is well settled. It is said that the context here is sufficient to justify the Court in giving to the word "wife" in this gift a larger meaning than its primâ facie meaning; but I cannot find any such context.

I agree with what Romer L.J. has said with regard to *Re Burrow's Trusts* (1), which was, in my opinion, rightly decided by Kindersley V.-C.; and, as at present advised, I cannot follow the decision in *In re Lyne's Trust.* (2)

Solicitors: *C. F. Twist, for Hughes & Masser, Coventry: Sharpe, Parker, Pritchards, Barham & Lawford, for E. C. Newey, Birmingham.*

(1) 10 L. T. 184. (2) L. R. 8 Eq. 65.
(3) 22 W. R. 622.

G. I. F. C.

C. A.
1903
April 30.

YOUNG *v.* ASHLEY GARDENS PROPERTIES, LIMITED.

[1902 Y. 621.]

Lease—Lessor and Lessee—Covenant by Lessee not to assign without Licence "not to be unreasonably withheld"—Licence—Unreasonable Condition—Assignment without Licence—Practice—Jurisdiction—Declaratory Order—Rules of Supreme Court, 1883, *Order* XXV., *r.* 5.

Where a lease contains a covenant by the lessee not to assign without the licence in writing of the lessor, "such licence not to be unreasonably withheld," although the lessor, in refusing a licence to assign, is not bound to give any reason for his refusal, yet if, in granting a licence he attaches to it a condition which, in the opinion of the Court, is unreasonable, the Court will, in an action brought by the lessee for the purpose, make a declaratory order under the Rules of the Supreme Court, 1883, Order XXV., r. 5, declaring that the lessor is not entitled to impose the unreasonable condition, and that the lessee is entitled to assign without any further consent of the lessor.

THE plaintiff was lessee of a flat in Ashley Gardens, Westminster, from the defendants for a term of twenty-one years at a yearly rent of 130*l.* under a lease dated June 24, 1896, granted by the defendants' predecessor in title, William Cooke. The lease contained a covenant by the lessee that he would not, without the licence in writing of the lessor, assign, underlet, or part with the possession of the flat, "but such licence shall not be unreasonably or arbitrarily withheld," and should not be necessary for the underletting of the flat furnished to some one tenant for a period not exceeding three months. The lessor covenanted to pay all existing and future rates, taxes, charges, assessments, and impositions whatsoever, parliamentary, parochial, or otherwise, charged in respect of the demised premises as part of the mansion of which they formed part, or otherwise.

About the end of August, 1902, the plaintiff, being desirous of assigning the flat to one J. H. Hale for the residue of the term, applied to the defendants for a licence to do so, whereupon the defendants sent to the plaintiff a form of licence dated September 9, 1902, and signed by the defendants' secretary, consenting to the assignment of the flat by the plaintiff

to Hale as from September 29, 1902, at the same time requesting that both the plaintiff and Hale should sign and return a duplicate which was also sent. The form of licence contained the following proviso: "Provided, that this consent is granted upon the terms and conditions that if, in consequence of the said assignment, the rateable value of the said hereditaments and premises is increased, you and the said J. H. Hale, or one of you, will on demand pay to the company any future increase of rates, taxes, charges, assessments, or impositions whatsoever assessed or imposed in consequence of the said assignment." The plaintiff objected to any such condition being attached to the licence, and also to his being limited to assigning only as from September 29, and he accordingly refused, both on his own and Hale's behalf, to sign the duplicate, but this signing the defendants waived. On September 10, 1902, the plaintiff issued the writ in this action, claiming a declaration that he was entitled to a licence in writing from the defendant company to assign the flat to Hale for the remainder of the term created by the lease; and also "damages for the unreasonable and arbitrary withholding of such licence by the defendant company in breach of the lessor's agreement not to do so in such lease contained."

There was an application by the plaintiff to amend the writ, but as the action was in the list for trial the master made no order upon it. The action came on for trial before Joyce J. without pleadings on November 13, 1902. In giving judgment his Lordship said he was not at all certain that the condition could be enforced, but he was clearly of opinion that the defendants had no right whatever to impose any such condition. Accordingly, treating the writ as amended so as to ask specifically for the following declarations, his Lordship pronounced a judgment declaring "that the defendants, Ashley Gardens Properties, Limited, were not and are not entitled to impose, as a condition for giving their consent to an assignment by the plaintiff of the lease of the premises in the writ of summons mentioned, any such proviso for payment of any future increase of rates and taxes as that contained in the document of September 9, 1902 (purporting to be a licence), or

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any proviso to the like effect; and that the plaintiff is entitled to assign his lease to J. H. Hale without any further consent of the defendants": and the defendants were ordered to pay the costs of the action.

The defendants appealed.

The appeal was heard on April 30, 1903.

Hughes, K.C., and *W. H. Cozens-Hardy*, for the defendants. The question is whether the lessee can seek such a remedy against the lessors as is sought here. We contend that the lessee is not entitled to assign, even though a licence to do so is unreasonably withheld. The condition the lessors seek to impose here is not an unreasonable one, considering that the effect of an assignment may be to throw upon them an increased burden under their covenant to pay all rates and taxes. This action is misconceived. A lessor ought not to be subjected to an action on the footing of an obligation upon him to grant a licence. We submit that the lessee cannot assign without licence, and that it is unreasonable for him to bring an action against the lessors for withholding a licence. The effect of the covenant is not to impose an obligation on the lessors, but to make a qualification of the lessee's rights: it leaves the lessee to deal with the premises without any restriction if the licence is unreasonably withheld: there is no covenant on the part of the lessors to give their consent, and therefore this action must fail: *Treloar* v. *Bigge* (1); *Sear* v. *House Property and Investment Society*. (2) We do not dispute the jurisdiction of the Court to make a declaratory order under the Rules of the Supreme Court, Order XXV., r. 5; but we say that this is an attempt to impose upon the lessors an obligation not to withhold their consent. They are entitled to withhold their consent as long as they choose, and are not bound to give any reason for so doing.

[VAUGHAN WILLIAMS L.J. It is impossible to maintain that the condition you seek to impose is reasonable.]

The action having been wrongly framed, the learned judge ought not to have ordered the defendants to pay the whole costs of the action.

(1) (1874) L. R. 9 Ex. 151.

(2) (1880) 16 Ch. D. 387.

Badcock, K.C., and *C. Gurdon*, for the plaintiff, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion the declaration made by Joyce J. in this case is correct. In the action, as originally framed, the claim was wrong, but there was an application to amend, and at the trial Joyce J. said that the writ was to be treated as amended. It is true that at the time he made that order to amend it was open to him to have made it upon conditions. It might have been urged upon him that, having regard to the circumstances in this case, conditions ought to have been made imposing some burden upon the plaintiff in respect of the costs. I do not know whether such conditions were suggested or not; but, at all events, no such conditions were imposed, and that is a matter on which we ought not to interfere with the discretion of the judge. Upon the writ as amended, it seems to me that this order is quite right.

It was urged upon us that a landlord is not bound to give any reason for refusing his licence. I agree; but if he does give a reason, and chooses to say, "I will only grant a licence on this or that condition," which condition proves to be unreasonable, and the matter then comes into Court, it seems to me that it would be quite shocking if the Court could not put an end to the dispute in the way the learned judge has done by this order. I mean it would be quite shocking if, the parties having come into Court, the Court were bound to say, "Although we have the whole matter before us, and although we consider the condition unreasonable, yet we cannot go any further and we must leave matters in this state, that the landlord may continue to abstain from granting his licence and the tenant must assign at his own risk—that is, at the risk of forfeiture." It seems to me that when the parties are once before the Court, and there now being power for the Court to make a declaratory order, an order may be made in that form. The learned judge has made a right order, and therefore this appeal fails and must be dismissed with costs.

ROMER L.J. I agree.

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COZENS-HARDY L.J. I agree. It must not be forgotten that, assuming the refusal to be unreasonable, it has this effect: it appreciably diminishes the value of the lessee's property; because, of course, it could only be assigned without a licence subject to the risk of his assignee being turned out by the lessor. I cannot imagine a more judicious or beneficial exercise of the jurisdiction to make a declaratory order than that which has been adopted by Joyce J. in this case.

Solicitors: *T. Blanco White; Webster & Webster.*

G. I. F. C.

C. A. 1903 BUCKLEY J. *Feb.* 25; *March* 4. C. A. *April* 21, 22; *May* 5.

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[1874 B. 264.]

Revenue—Estate Duty—Incidence—Legacies payable out of Fund representing Realty and Personalty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 8 (*sub-s.* 4), 9, 14 (*sub-s.* 1), 21.

A testator who died in 1869 (and therefore before the coming into operation of the Finance Act, 1894), after bequeathing certain legacies, gave his residuary realty and personalty to trustees upon trust to convert the same and pay his funeral and testamentary expenses and debts and the legacies thereinbefore bequeathed, and to invest the residue, and out of the income to pay his widow an annuity of 500*l.* And he directed that after the widow's death the trust funds should be held upon trust to pay thereout certain legacies amounting to 9000*l.*, and to divide the residue amongst certain persons named in the will. In an administration action a sum of Consols was carried over to the account of the annuity. The widow died in 1900 (after the Act came into operation), and in 1901 payment of the legacies was ordered, and inquiries were directed to ascertain the persons entitled to the residue.

Under s. 1 of the Finance Act, 1894, estate duty was payable on the widow's death on so much of the Consols as represented real estate; but under s. 21, sub-s. 1, the duty was not payable on the portion representing personal estate. The proportion representing real estate was taken as twelve-seventeenths of the whole fund, and the estate duty on twelve-seventeenths of the legacies (9000*l.*) was 223*l.* That and the legacy duty were paid, and the difference between the aggregate of the two sums and the 9000*l.* was paid to the legatees:—

Held, by Buckley J., that the pecuniary legatees were not persons entitled to a sum charged on the property within s. 14, sub-s. 1, and that

they were not liable for the 223*l.*, but were entitled to be recouped the amount out of the portion of the fund representing real estate:

Held, by the Court of Appeal, upon the construction of s. 8, sub-s. 4, that the pecuniary legatees ought to bear the 223*l.*

Per Vaughan Williams L.J.: *In re Countess of Orford*, [1896] 1 Ch. 257, is a decision on the construction of the Finance Act, 1894, that in all cases where estate duty becomes payable for which the executor is not made accountable by s. 6, sub-s. 1, the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares.

THE following statement of facts is taken from the judgment of Buckley J.:—

John Berry died on August 25, 1869, having by his will, made the same day, after bequeathing certain legacies, devised and bequeathed his residuary real and personal estate to trustees upon trust to convert the same and pay his funeral and testamentary expenses and debts and the legacies thereinbefore bequeathed, and to invest the residue, and out of the income to pay his wife an annuity of 500*l.* a year, and to pay some other small annuities. And the testator directed that after his wife's death his trustees should hold the trust funds upon trust to pay thereout certain legacies, amounting in the aggregate to 9000*l.*, and then to divide the residue amongst certain persons named in the will. An administration action was brought, and in the action a sum of Consols was carried over to the account of the widow's annuity. The widow died on November 16, 1900. By an order dated March 12, 1901, payment of the legacies was ordered, and inquiries were directed to ascertain the parties entitled to the residue. Under s. 1 of the Finance Act, 1894, estate duty became payable on the widow's death upon so much of the fund as represented proceeds of real estate of John Berry, in that it was settled property in which the deceased (the widow) had an interest ceasing on her death. Having regard to s. 21, sub-s. 1, of the Finance Act, estate duty was not payable so far as the fund represented personal estate. The proportion of the fund representing real estate was ascertained or taken to be twelve-seventeenths of the total amount. The estate duty upon twelve-seventeenths of the 9000*l.*, being the amount required to pay the legacies, was 223*l.* 14*s.*, and that was paid. The

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legacy duty was also paid. Payment was then made to the legatees of the difference between their respective legacies and their respective proportions of the 223*l.* 14*s.* and of the legacy duty. The pecuniary legatees of the 9000*l.* had thus borne the 223*l.* 14*s.* and also the legacy duty on their legacies. A summons was taken out for the determination by the judge of the question whether the pecuniary legatees ought to bear the 223*l.* 14*s.*, or whether that amount ought to be thrown upon the annuity fund or the portion of it representing real estate, so as that the residuary legatees and not the pecuniary legatees should bear it.

The summons was heard before Buckley J. on February 25, 1903.

W. Baker, for the pecuniary legatees. The residue has to bear the duty. Under s. 1 of the Finance Act, 1894 (1), estate

(1) The following are the material provisions of the Finance Act, 1894:—

Sect. 1: "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

"(*a*) Property of which the deceased was at the time of his death competent to dispose;

"(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole. . . ."

Sect. 8: "(4.) Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the Commissioners allow, deliver to the Commissioners

duty is payable upon the principal value of all real or personal property, settled or not settled, which passes on the death of a

and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property."

Sect. 9: "(1.) A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a bonâ fide purchaser thereof for valuable consideration without notice."

"(5.) A person authorized or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof.

"(6.) A person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him."

Sect. 14: "(1.) In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary."

Sect. 21: "(1.) Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this Part of this Act, in respect of which property any duty mentioned in paragraphs one and two of the First Schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property."

First Schedule.

Par. 1: "The stamp duties imposed by the Customs and Inland Revenue Act, 1881, on the affidavit to be required and received from the person applying for probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland."

Par. 2: "The stamp duties imposed by s. 38 of the Customs and Inland Revenue Act, 1881, as amended and extended by s. 11 of the Customs and Inland Revenue Act, 1889, on the value of personal or movable property to be included in accounts thereby directed to be delivered."

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person dying after August 1, 1894. By s. 2, sub-s. 1, the property so passing is to be deemed to include "(*b*) property in which the deceased . . . . had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest," and also "(*d*) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." By s. 21, estate duty is not payable on the death of a person in respect of personal property settled by a will or disposition of a person dying before August 1, 1894, if probate duty is payable in respect of it. The testator died before that date. The legacy duty has been paid, but the legatees were told that they could not have their legacies until the estate duty was paid, and the amount of that duty proportionate to their legacies has been deducted from their legacies, and the question is whether they ought to be recouped in respect of that amount.

Austen-Cartmell, for the residuary legatees. The fund was paid into court to provide for the annuity. The widow was tenant for life of what was a "settled" fund: *In re Campbell*. (1) Estate duty was, on the death of the tenant for life, payable under s. 1 of the Act. That section and s. 2 are mutually exclusive: *Earl Cowley* v. *Inland Revenue Commissioners* (2), the former applying to property which passes on a death, and the latter to property which is "deemed" to pass thereon. On the death of the testator only probate duty was payable, but on the widow's death the property passed, and primâ facie estate duty became payable on the whole of it. Sect. 21, sub-s. 1, however, exempts so much of the fund from estate duty as was charged with probate duty on the testator's death. The Act draws a clear line of demarcation between property which passes to the executor as such and property not so passing. The provisions applicable to the former case are s. 6, sub-s. 2, and s. 8, sub-s. 3, and the executor has to pay the duty, which is a testamentary expense payable out

(1) [1902] 1 K. B. 113. (2) [1899] A. C. 198.

of the general residue: *In re Webber.* (1) Where the property does not pass to the executor as such (which is the case here, the death being that of the widow), the relevant provisions are s. 8, sub-s. 4, s. 9, sub-s. 1, and s. 14. As the widow could not dispose of the fund, her executor was not accountable for estate duty. The trustees of the testator's will, as trustees and not in their executorial capacity, and the beneficiaries were accountable, and, the duty being thrown on the fund, s. 14 distributes the burden rateably amongst the beneficiaries, namely, the legatees of the 9000*l.* and the persons who are entitled to the residue: *In re Countess of Orford.* (2) There is not in this will any "provision to the contrary" within the meaning of s. 14, sub-s. 1, for the estate duty, which is payable on the death of the widow—not that of the testator—is not a testamentary expense of the testator: *Sharp* v. *Lush* (3); *In re Clemow* (4); *In re Treasure.* (5) Again, estate duty on real estate is not a testamentary expense: *In re Jolley* (6); *In re Sharman.* (7) The primary burden on devisees of land in respect of estate duty on the land is not removed by a direction to pay testamentary expenses. The fact that there is a gift of a specific sum followed by a gift of residue is not a "provision to the contrary": *In re Countess of Orford* (2); *In re Power.* (8) [He also referred to *In re Parker-Jervis* (9); *In re Chisholm* (10); *Wade* v. *Wade.* (11)]

Baker, in reply. Sect. 14 has no application to the present case. In the first place, the legacies are not "any sum charged on any property." Secondly, if they are, there is in the will an "express provision to the contrary." In *In re Countess of Orford* (2) there was a sum charged on the property; it was charged on land. Here there is a mixed fund of realty and personalty. [He also referred to *In re Duke of St. Albans.* (12)]

Cur. adv. vult.

(1) [1896] 1 Ch. 914.
(2) [1896] 1 Ch. 257.
(3) (1879) 10 Ch. D. 468.
(4) [1900] 2 Ch. 182.
(5) [1900] 2 Ch. 648.
(6) (1901) 17 Times L. R. 244.
(7) [1901] 2 Ch. 280.
(8) (1898) 47 W. R. 183.
(9) [1898] 2 Ch. 643.
(10) [1902] 1 Ch. 457.
(11) [1898] 2 Ch. 276.
(12) [1900] 2 Ch. 873.

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March 4. BUCKLEY J. (after stating the facts). The annuity fund is settled property within the Finance Act, 1894: *In re Campbell.* (1) By s. 9, sub-s. 1, of the Act the estate duty is a first charge on the property. When the duty has been raised under this charge and paid, there remains to be administered a fund more than sufficient to pay the 9000*l.* legacies. In a due course of administration the legatees would receive their 9000*l.*, less of course the legacy duty, and the balance would be paid to the residuary legatees. Or again, if the executor under s. 6, sub-s. 2, or any of the parties accountable under s. 8, sub-s. 4, pays the duty, he will be entitled to a charge under s. 9, sub-ss. 5 and 6; and again, the duty being raised under this charge and paid, the balance will be administered as before between the pecuniary legatees and the residuary legatees; or again, if the pecuniary legatees (who seem primâ facie to be persons to whom the property passes for a beneficial interest in possession on the death of the widow within s. 8, sub-s. 4) themselves pay the duty, they would be entitled to the like charge under s. 9, sub-s. 6, and could recover it by virtue of that charge, and would thus not bear the duty themselves.

But Mr. Cartmell, to whom and to whose intimate knowledge of this difficult Act I am indebted for a most valuable argument, contends for the residuary legatees that the pecuniary legatees of the 9000*l.* are, within s. 14, sub-s. 1, "persons entitled to a sum charged" on the property. It is thus necessary to determine what upon the true construction of s. 14, sub-s. 1, is "a person entitled to a sum charged." In my opinion, that person is a person not included within the class of persons who under s. 8, sub-s. 4, are accountable for the duty. I arrive at this conclusion upon the following grounds:—

(1.) If that person be so included, then s. 14, sub-s. 1, gives to every member of the class accountable under s. 8, sub-s. 4, except that person, a right to sue him, and gives him no similar right to sue any other member of that class—a construction which, in the absence of good reason to the contrary, seems highly improbable.

(2.) In s. 14, sub-s. 1, the person authorized and required

(1) [1902] 1 K. B. 113.

to pay the estate duty is, I think, mentioned by way of contrast to the person entitled to the sum charged.

(3.) If the person entitled to the charge is a member of the class accountable under s. 8, sub-s. 4, the following result ensues: (*a*) If he pays the duty, then under s. 9, sub-s. 6, he will be entitled to a charge, and can recover as against the property all that he has paid, and he in that case will bear nothing, for s. 14, sub-s. 1, does not enable a person who has not paid (which in this case would include all the other members of the class accountable) to recover against him; whereas, (*b*) if another member of the class accountable pays the duty, then the person entitled to the charge can be rendered liable to bear his proportion, for under s. 14, sub-s. 1, the person who has paid can sue him. It is impossible to adopt a construction which would lead to so incongruous a result.

And (4.) if the construction be adopted that the person entitled to the charge is not, within s. 8, sub-s. 4, a person accountable, the whole matter falls into order. For, being excluded from s. 8, sub-s. 4, he pays nothing to the revenue, and the person liable to the revenue can recover, under s. 14, sub-s. 1, the proper sum from him.

Sect. 14, sub-s. 1, in my opinion, contemplates the case of persons who either are entitled to such a charge as under s. 7, sub-s. 1, is brought into account for the purpose of estimating the duty (say a charge made by the testator in his lifetime in favour of the trustees of his daughter's marriage settlement), or persons who under the testator's disposition become entitled to capital sums, say to portions, or to annuities, say rent-charges, charged upon the testator's property. If the case of such persons be considered, I think it will be found that the construction at which I arrive works consistently so as to throw upon such persons the proper portion of the duty which they ought to bear.

I am therefore of opinion that the "person entitled to a charge" under s. 14, sub-s. 1, is in this Act excluded from the class of persons who in s. 8, sub-s. 4, are spoken of as being persons to whom property passes for a beneficial interest in possession.

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It remains to determine what upon the above principles is the character borne by the 9000*l.* legatees in the present case. If A. bequeaths 100*l.* to B., and his residue to C., it is impossible, I think, to say, or at any rate to say for the purposes of this Act, that B. is a person entitled to a charge. B. takes a fixed sum, and C. takes what remains, but B. does not take by way of charge. B. is, I think, in that case a person who, within s. 8, sub-s. 4, takes a beneficial interest in possession.

Next suppose that A. dies before the Finance Act, having bequeathed his property to X. for life, and having given upon the death of X. 100*l.* to B., and the residue to C. Upon the death of X. it seems to me that B. takes a beneficial interest in possession, just as in the former case he took such an interest upon the death of A.

The 9000*l.* legatees in this case, in my judgment, take beneficially in possession under s. 8, sub-s. 4, and are not persons entitled to a charge within s. 14, sub-s. 1.

Mr. Cartmell, however, refers to the decision of North J. in *In re Countess of Orford.* (1) That case is, I think, distinguishable. At p. 263 the learned judge, after referring to the decision of Stirling J. in *In re Bourne* (2), and pointing out that that was a decision in respect of the estate of a testator who was dealing with his own estate, goes on to say: "But the present case is quite different. It is not a case of dealing with a testator's own estate." The disposition with which North J. had to deal was a disposition by way of exercise of a power. The case before me is a case of dealing with the testator's own estate.

For these reasons I think that the 223*l.* 14*s.* is not to be borne by the pecuniary legatees of the 9000*l.* They are entitled to receive payment of their legacies (the fund after payment of the estate duty being sufficient for that purpose), less of course the legacy duty.

F. E.

C. A.

The residuary legatees appealed. The appeal was heard on April 21 and 22, 1903.

(1) [1896] 1 Ch. 257. (2) [1893] 1 Ch. 188.

Austen-Cartmell, for the residuary legatees. It is admitted that the fund set apart to pay the widow's annuity is a settled fund, and that under s. 1 of the Finance Act, 1894, estate duty is payable in respect of it: *Earl Cowley* v. *Inland Revenue Commissioners* (1); *In re Campbell*. (2) But the duty is payable only in respect of so much of the fund as represents the proceeds of real estate, because probate duty or its equivalent was paid upon the personal estate on the death of the testator, and, therefore, the personal estate is exempt from estate duty: s. 21, sub-s. 1. It has been ascertained that twelve-seventeenths of the fund represents the proceeds of real estate. Buckley J. has held that the estate duty upon twelve-seventeenths of the 9000*l.* legacies must be borne by the residue. It is submitted that upon the true construction of the Act the duty as regards twelve-seventeenths of the 9000*l.* ought to be paid out of the 9000*l.* A clear distinction is drawn in the Act between property which passes to the executor of the deceased person as such and property which does not pass to him as such. This annuity fund did not pass to the widow's executor as such. The executor of the deceased is by s. 6, sub-s. 2, bound to pay the estate duty in respect of all personal estate of which the deceased was competent to dispose at his death, and he may pay the duty in respect of any other property passing on the death. In the former case the executor must pay the duty out of the general personal estate of the deceased, and he has no right of recoupment against pecuniary legatees: *In re Webber*. (3) By s. 9, sub-s. 1, the duty in respect of property which does not pass to the executor as such is made a first charge upon the property itself. And as regards such property provision is made by s. 14, sub-s. 1, for the apportionment of the burden of the duty between the persons beneficially entitled to the property. That section applies to the present case. But, independently of that section, s. 8, sub-s. 4, gives a right to have the duty apportioned. By s. 8, sub-s. 3, the executor is made accountable for the estate duty in respect of all personal property of which the deceased was competent to dispose at

(1) [1899] A. C. 198. (2) [1902] 1 K. B. 113.
(3) [1896] 1 Ch. 914.

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his death. As regards other property which passes on the death, the executor of the deceased is not accountable for the duty, and then by s. 8, sub-s. 4, every person to whom any property so passes for a beneficial interest in possession is accountable for the estate duty. This shews that in such a case as the present the legacies respectively must bear their rateable proportion of the duty. The trustees of the whole fund are accountable to the Crown for the duty upon it. On the death of the testator the fund was clear, and it became a settled fund of which the widow was tenant for life, and on her death the fund became divisible in definite proportions between the legatees and the residuary legatees. Sect. 9, sub-s. 1, also assists the argument for the residuary legatees. But the legatees have a first charge on the fund, and, that being so, s. 14, sub-s. 1, provides that they must pay their rateable part of the duty. The whole duty must be first paid out of the settled fund. Then the remainder of the fund must be distributed among the persons entitled to it, and the duty ought not to be thrown exclusively upon the residue.

[COZENS-HARDY L.J. You are attempting to introduce into the Finance Act the provisions of the Legacy Duty Act.]

It is submitted that s. 14, sub-s. 1, has that effect.

[VAUGHAN WILLIAMS L.J. Primâ facie that is a provision for the recoupment of the person who pays the duty.]

The principle of *In re Countess of Orford* (1) applies. That case arose upon an appointment of part of a settled fund to one person and the remainder to another, and it was held that the estate duty must, under s. 14, sub-s. 1, be borne pari passu by the specific and residuary appointees. The residuary legatees are entitled to call on the trustee of the fund to enforce for their benefit the right of recoupment which is given to him by s. 14, sub-s. 1. This view is confirmed by *In re Maryon-Wilson*. (2) In *In re Duke of St. Albans* (3) it was admitted that legatees and annuitants entitled to charges on real estate settled by a will must bear their proportion of the estate duty, and there was a similar admission in *In re Chisholm*. (4) That

(1) [1896] 1 Ch. 257, 262, 264.
(2) [1900] 1 Ch. 565.
(3) [1900] 2 Ch. 873.
(4) [1902] 1 Ch. 457.

case also arose upon an appointment of a settled fund. In *Wade* v. *Wade* (1) Kekewich J. did indeed hold that s. 14, sub-s. 1, has no reference to the incidence of estate duty, but is intended for the protection of the executor by giving him a right to recoupment. But that case is inconsistent with the subsequent decisions of the same learned judge in *In re Parker-Jervis* (2) and in *In re Power*. (3) In *In re Gray* (4) it was held that the estate duty in respect of a sum of money, which a father had covenanted to pay to the trustees of his son's marriage settlement, must, as between the father's executors and the trustees of the settlement, be borne by the executors. But by s. 7, sub-s. 1, in determining the value of an estate for the purpose of estate duty, no allowance is to be made for debts incurred by the deceased, unless incurred for full consideration in money or money's worth for the deceased's own use and benefit.

[VAUGHAN WILLIAMS L.J. referred to *In re Meyrick*. (5)]

Cases relating to account stamp duty payable under s. 38 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), have some bearing on the present case: *In re Croft* (6); *In re Shaw*. (7)

The fund in the present case is a mixed fund arising from the proceeds of both real and personal estate. The legatees have no right to claim payment exclusively out of that part of the fund which arose from personalty. In case of non-payment their remedy would have been by an action for the administration of the trusts of the will.

As regards s. 8, sub-s. 4, in the expression "every person to whom any property so passes for any beneficial interest in possession," "any property" means any item of property which comes to that person, and in the expression "shall be accountable for the estate duty on the property," "the property" means that property which comes to that person. In other words, the trustees of the fund are accountable to the

(1) [1898] 2 Ch. 276.
(2) [1898] 2 Ch. 643.
(3) 47 W. R. 183.
(4) [1896] 1 Ch. 620.
(5) [1897] 1 Ch. 99.
(6) [1892] 1 Ch. 652.
(7) [1895] 1 Ch. 343.

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Crown for the whole duty in respect of the fund, and each beneficiary is accountable for the duty in respect of that part of the fund which comes to him. This view is confirmed by the language of s. 4. Sect. 14, sub-s. 1, supplements s. 8, sub-s. 4, and enables the owner of property subject to a charge, if he has paid the whole duty in respect of the property, to recover the proper proportion from the person entitled to the charge. But it is submitted that, without s. 14, sub-s. 1, s. 8, sub-s. 4, is enough to entitle the residuary legatees to an apportionment of the estate duty among the persons entitled to this annuity fund.

W. Baker, for the pecuniary legatees. The result of the argument on behalf of the appellants is to alter the general rule that a legacy is paid in full before the residuary legatee takes anything, and the larger the residue the higher would be the duty and the smaller the sum payable to the legatee. The testator intended "legacy" to mean the same thing in both parts of his will, but the appellants' argument would give it different meanings. There is nothing in the Act which expressly says that these legacies are to be liable to a rateable portion of the duty, and it is submitted that it ought not to be inferred.

[ROMER L.J. I think that here all ordinary expenses must be borne by the residue. The onus is on the other side to shew that by the Act a portion of this estate duty is to be borne by the other beneficiaries.]

No doubt a legatee must bear legacy duty, because the Legislature has said so in express terms, but the Act of 1894 does not say that he is to bear estate duty. Estate duty is analogous to probate duty: *In re Bourne* (1); *In re Countess of Orford* (2), which is distinguishable: see *In re Saunders*. (3) With regard to s. 14, sub-s. 1, these legacies are not sums charged on the residue; and even if they were, this will contains an express provision to the contrary within the section by the use of the word "legacy." As to s. 8, sub-s. 4, a legacy does not come within the words of that enactment.

(1) [1893] 1 Ch. 188. (2) [1896] 1 Ch. 257, 263.
(3) [1898] 1 Ch. 17, 22.

"The property" means that property for which the trustee is liable—that is, the whole property. The object of the section is not to determine the liabilities of the beneficiaries inter se, but to shew where the Crown is to get the duty. The words "every person to whom any property so passes for any beneficial interest in possession" do not include a legatee. There is no part of the testator's property of which the legatee has possession. The legacy is a debt from the executor.

[ROMER L.J. referred to s. 9, sub-s. 1.]

Austen-Cartmell, in reply. "Property" in s. 9, sub-s. 1, and s. 8, sub-s. 4, means the particular item of property in which the person sought to be charged has an interest either as beneficiary or as trustee. The estate duty in this particular case is analogous to legacy duty or succession duty, and is not analogous to probate duty.

Cur. adv. vult.

May 5. VAUGHAN WILLIAMS L.J. I take the facts as stated in the judgment of Buckley J., and I agree with him as to the question which we have to propose to ourselves—which is, whether the pecuniary legatees ought to bear the 223*l.* 14*s.*, or whether that amount ought to be thrown upon the annuity fund, or the portion of it representing the real estate, so that the residuary legatees and not the pecuniary legatees shall bear it. It is to be recollected that the property in respect of which the question of the incidence of estate duty arises in this case is property of which the deceased was not competent to dispose, and that in respect of such property the scheme of the Act is to tax, not the interest which ceased with the death, but the property out of which the interest was enjoyed. Sect. 8 of the Finance Act provides for the collection of estate duty, and sub-s. 4 of that section provides for cases in which property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of that property. Now that is admittedly the present case. In such case it is provided that "every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed

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of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property." In my judgment each of the pecuniary legatees and also the residuary legatees took upon the death of the annuitant a portion of the property for which her executor was not accountable for a beneficial interest in possession, and as such became accountable for the duty, and therefore debtors to the Crown for the duty. In the present case I do not think it is necessary to decide whether each person taking a beneficial interest in possession became accountable for the duty on the whole 9000*l.*, or only to the extent of his beneficial interest, but I am inclined to think only to the extent of his beneficial interest. By s. 9, sub-s. 5, any person authorized or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty or raising the amount of the duty when already paid, have power to raise the amount by sale or mortgage of the property. This sub-section applies to all property passing, whether "free property" of the testator or not. Sub-s. 6 of s. 9 provides that a person having a limited interest in any property who pays the estate duty in respect of that property shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him. I agree with Buckley J. that sub-s. 6 would give this charge to any person accountable under s. 8, sub-s. 4. It was argued before Buckley J. that s. 14, sub-s. 1, would enable a person accountable under s. 8, sub-s. 4, to recover an amount equal to the proper rateable part of the estate duty from persons to whom property passes for any beneficial interest in possession within the meaning of s. 8, sub-s. 4, as being persons entitled to a charge on such property. I suppose the argument was meant to apply to a case in which the person authorized or required to pay the estate duty had paid that duty on the whole sum out of which the interests in possession passed on the death of the deceased. I doubt, however, whether, even in such case, the persons

taking the interest in possession would fall within the words "the person entitled to any sum charged on such property." I will assume the negative for the purpose of my judgment; but, notwithstanding my agreement in most of the premises arrived at by Buckley J., I cannot agree in his ultimate conclusion. It seems to me that the moment you find that under s. 8, sub-s. 4, every person to whom property (other than free property of the testator) passes for a beneficial interest in possession (which includes these pecuniary legatees) is accountable for the duty, be it on the whole fund or his portion of the fund, and therefore pro tanto a debtor to the Crown, the Court ought in the due course of administration to take the whole duty out of the fund, and to deduct that duty rateably from the legacy of each legatee and from the residuary share alike. If this were not so, the ultimate incidence of the estate duty on the fund passing would depend upon the accident of which of the parties accountable was in fact called on to pay, or on the fact that no one was called on to pay, but that payment was left to be determined in due course of administration. It seems to me that the pecuniary legatees cannot relieve themselves of the burden of a rateable part of this duty unless they can shew that, outside the Finance Act, there is something which entitles the pecuniary legatees to have, as against the residuary legatees, the amount of their legacies free of estate duty. Now, in the first place, it seems to me the whole scheme of the Finance Act, so far as it relates to property passing on the death of the deceased in respect of which his executor is not responsible for estate duty, is to tax the property itself so passing, and to make the estate duty a first charge. The decision of North J. in *In re Countess of Orford* (1) seems to me to be a distinct authority on the construction of the Finance Act, 1894, that in all cases where the duty becomes payable for which the executor is not made accountable by s. 6, sub-s. 1, the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares, and it follows that the duty cannot be thrown wholly on the residue. North J., although he thought s. 14 supported the

(1) [1896] 1 Ch. 257.

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conclusion he was arriving at, nevertheless arrived at his judgment independently of s. 14, and, I think, independently of the fact that in that case the funds were settled upon trust to invest in land. It was argued that the residuary legatees ought to bear the estate duty in this case by reason of the rule as between specific and residuary legatees laid down by Lord Selborne in *Robertson* v. *Broadbent* (1) and *Bothamley* v. *Sherson* (2), and it was said also that the estate duty was analogous to probate duty, and that the ultimate incidence of this estate duty ought to be determined as if it were probate duty, and the case of *In re Bourne* (3) and the judgment of Stirling J. were cited in support of this contention. But I do not think that the observations of Stirling J. are applicable to the present case, for it seems to me that estate duty in a case in which property passes on the death of the deceased and his executor is not accountable for estate duty is not analogous to probate duty, but rather to succession duty. Moreover, whatever may be the analogy, it seems to me that the scheme of the Finance Act in cases in which the "executor as such" is not accountable for estate duty, and in particular the terms of s. 8, sub-s. 4, making the person to whom such property passes for a "beneficial interest in possession" accountable, exclude the analogy of probate duty, and also any rule which governs the incidence of charges and costs between specific legatees and residuary legatees inter se.

ROMER L.J. I also think that the appeal must succeed. I quite agree that the onus is on the appellants to shew that under the Finance Act of 1894 a rateable part of the estate duty is cast upon the pecuniary legacies payable out of the proceeds of sale of the realty. If the Act contained no provision to that effect, then the appellants, being only entitled to the residue of the proceeds, could not throw any part of the duty on the pecuniary legatees. On the other hand, if the Act does cast on the pecuniary legatees a proportionate part of the duty, there is nothing which would justify the Court in

(1) (1883) 8 App. Cas. 812. (2) (1875) L. R. 20 Eq. 304.
(3) [1893] 1 Ch. 188.

holding that, as between the residuary and pecuniary legatees, the former must indemnify the latter against that proportionate part. I think that in cases like the present the Act does cast a rateable part of the duty on the pecuniary legatees. Sect. 8, sub-s. 4, applies. In my opinion the pecuniary legacies are "property" which passed on the death of the annuitant to the legatees for a "beneficial interest in possession." And in this case the interest in possession is an absolute interest. In my view the word "property," which is used in different parts of this sub-section, does not in every part mean of necessity exactly the same property. I think the section has been expressly framed so as to make it elastic. For example, the words "any property" do not mean of necessity the whole of the property which passes on the death within the meaning of the phrase that opens the sub-section. In the present case, I think, the pecuniary legacies come within the words "any property"; and, that being so, I think that under s. 9, sub-s. 1, the duty assessable as against these legacies became a first charge on the legacies as against the legatees; and, as above observed, I find nothing in the Act or the will which would justify the Court in freeing the pecuniary legatees from this charge by making the residuary legatees indemnify them from it. In this view it becomes unnecessary for me to consider the effect of s. 14, sub-s. 1, of the Act. I may add that in my view, inasmuch as the pecuniary legatees became absolutely entitled to the legacies, they could under s. 8, sub-s. 4, be made liable by the Crown to pay, not all the duty on the whole proceeds of the realty, but only the duty chargeable as against the pecuniary legacies. On the other hand, though it is not necessary for me to determine the point, I incline to the view that not only the trustees of the whole fund, but also the beneficiaries who became entitled to the residue, could at the instance of the Crown have been made to pay the whole duty on the fund. But in that event there would have been, under the general law applicable to such cases, a right of adjustment and recoupment as between the residuary and pecuniary legatees by treating the whole duty as rateably payable by the residuary and pecuniary legacies. And, moreover (though,

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as above stated, it is not necessary for me to determine the point) I may add that s. 9, sub-s. 6, appears to me to allow the residuary legatees paying the whole duty (they having only a limited interest in the fund regarded as a whole) to recoup themselves as to the part assessable against the pecuniary legatees by obtaining a charge which would rateably embrace the interest of the pecuniary legatees in the fund.

COZENS-HARDY L.J. In my opinion the judgment of Buckley J. cannot be supported. It seems plain that the annuity fund was property passing on the death of the annuitant within the meaning of the Finance Act, and, in so far as the annuity fund arose from the proceeds of sale of real property, it was property in respect of which estate duty became payable, notwithstanding s. 21, sub-s. 1. The estate duty has been paid by the trustees, and the question is simply whether the legatees of the 9000*l.* are bound to contribute their rateable proportion of the estate duty, or whether the whole must be borne by the persons entitled to the residue of the fund. Before Buckley J. the argument for the residuary legatees seems to have been rested mainly on s. 14, sub-s. 1, the legacies being treated as charged upon the fund belonging to the residuary legatees, and the legatees being, therefore, bound to repay. I doubt whether this contention was well founded; but it is not in my view necessary to decide this, for I prefer to base my judgment upon s. 8, sub-s. 4. I think the legacies must be regarded as property which passed to the legatees for a beneficial interest in possession on the death of the annuitant. If so, the legatees were accountable to the Crown for the estate duty. It is true that the Crown, having the right to demand the duty from other persons—namely, the trustees—has not proceeded against the legatees; but that, I think, can make no difference. It is an old and well-established principle of equity that, when several persons are liable in respect of one and the same obligation, the rights of the parties inter se are not affected by the circumstance that one of those persons has been called upon to discharge and has discharged the obligation. This right of contribution must, I think,

prevail here; and, although the money has been found out of the entire fund, it ought to be contributed rateably according to the beneficial interests in the fund, or, in other words, the legatees must bear their rateable proportion. This is, I think, exactly the sort of case contemplated by s. 14, sub-s. 2. The only other question is whether there is anything in the language of the will sufficient to exempt the legatees from this liability to contribute. I can find nothing in the use of the word "legacy" to justify this conclusion. The charge created by the Finance Act under s. 9, sub-s. 1, was, of course, not in contemplation by the testator, who died many years before the Finance Act. It is a fresh burden, and it must be borne rateably according to the beneficial interest of the parties in the fund.

Solicitors for pecuniary legatees: *Williamson, Hill & Co., for England & Co., Halifax.*

Solicitors for residuary legatees: *James, Mellor & Coleman.*

H. B. H.

KEKEWICH J.

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May 5.

In re BENNET.
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[1903 B. 381.]

Settlement—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 6; *s.* 58, *sub-s.* 1 (*ix.*)—*Persons having together the Powers of a Tenant for Life—Annuitants entitled to Rents and Profits of Land.*

A testator devised his residuary real and personal estate to trustees upon trust to pay out of the rents and profits several life annuities to persons specified, and directed that if in any year there should be a surplus of the income of his residuary real and personal estate over the total amount of the annuities, the trustees should divide the same between such of the annuitants as should be living in shares proportionate to the amount of the annuities to which they should be then entitled:—

Held, that as the annuitants for the time being were, between them, entitled to the entire rents and profits of the residuary real estate, they were persons having together the powers of a tenant for life under s. 58 of the Settled Land Act, 1882.

ADJOURNED SUMMONS.

Robert O. G. Bennet by his will dated February 13, 1901, appointed his wife Jane Bennet, his brother Charles John Bennet, and George Edward Smith and George William Hobson executors and trustees thereof, and also trustees for the purposes of the Settled Land Acts, and after devising an estate known as his Benetston estate unto and to the use of his trustees on trust for his nephew Norman Bennet for life without impeachment of waste with remainders over, devised and bequeathed all the rest, residue, and remainder of his real and personal estate unto and to the use of his trustees, their heirs, executors, administrators, and assigns, according to the nature and tenure of the same respectively, upon trust out of his personal estate, and if and so far as his personal estate should be insufficient then, but not otherwise, out of his residuary real estate, to pay his funeral and testamentary expenses and debts, and the legacies thereby or by any codicil thereto bequeathed, and subject thereto upon trust to pay out of the rents, profits, and income of his residuary real and per-

sonal estate the following annuities, namely, in the first place to each of them, Charles John Bennet, George Edward Smith, and G. W. Hobson, if and so long as he respectively should continue to act as executor and trustee of that his will, the sum of 10*l.* during his life, and to his wife an annuity of 400*l.* during her life or until she should marry again, and if she should marry again then during the remainder of her life the annual sum of 300*l.*, and to Charles John Bennet (whether he should act as such trustee and executor or not) an additional annuity of 150*l.* during his life, and to his goddaughter Roberta Benneta Alethea De Jongh an annuity of 100*l.* during her life, and to his niece Florence Catherine Carnell an annuity of 50*l.* during her life, and, in the next place, to each of his four nephews, Norman Bennet, Francis Grey Bennet, Charles John Bennet the younger, and William Wilkie Bennet, and to his niece Ernestina Mary Green and his godson Robert Creighton Bennet an annuity of 50*l.* during his or her life respectively; and the testator declared that if in any year there should be a surplus of the income of his residuary real and personal estate over the total amount of the said annuities his trustees should divide the same between such of the said annuitants as should be living in shares proportionate to the amount of the annuities to which they should be then entitled, and for that purpose the person entitled for the time being to the income of his said real and personal estate subject to the said annuities should be considered as an annuitant, and entitled to share in such surplus income to the extent of the annuities thereby bequeathed to annuitants then deceased, and the testator directed that subject as aforesaid his trustees should stand possessed of his residuary real estate upon such and the same trusts as were thereinbefore declared concerning the said Benetston estate, and should stand possessed of his residuary personal estate upon such and the same trusts as would be applicable thereto if the same represented capital moneys arising from the sale of the Benetston estate under the powers conferred by the Settled Land Acts. The will contained no power of sale.

By a codicil to his will dated June 24, 1902, the testator

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declared that his brother Charles John Bennet should, in addition to the annuity of 150*l.* left to him in the will, receive during his life the several annuities which the testator had bequeathed to his nephews Norman Bennet, Francis Grey Bennet, Charles John Bennet the younger, William Wilkie Bennet, and Robert Creighton Bennet, and after his death the same annuities, amounting to the sum of 250*l.* annually, should revert to the annuitants respectively.

The testator died on June 27, 1902, and his will was duly proved by his executors other than George Edward Smith, who renounced probate thereof.

The present summons was taken out by Jane Bennet, Charles John Bennet, and G. W. Hobson, the trustees and executors of the will, as plaintiffs, against Norman Bennet, Roberta Benneta Alethea De Jongh, Florence Catherine Carnell, and Ernestina Mary Green as defendants, asking for the determination (inter alia) of the two following questions, namely, (1.) whether the tenant for life under the will of the Benetston estate was tenant for life and had the powers of a tenant for life in respect of the residuary estate of the testator within the meaning of the Settled Land Acts; and if that question should be decided in the negative, then (2.) whether the persons entitled for the time being as annuitants under the will and codicil had the powers of a tenant for life within the meaning of the said Acts.

His Lordship having decided the first question in the negative, the second question came on for argument. The further question was then raised whether or not the annuitants for the time being constituted the tenant for life within the meaning of s. 2, sub-ss. 5 and 6, of the Settled Land Act, 1882, it being intended to amend the summons, if necessary, so as to include that question.

E. S. Ford, for the plaintiffs, the trustees.

Sheldon, for the defendant Norman Bennet. First, it is submitted that the annuitants for the time being together constitute the tenant for life for purposes of the Settled Land Acts under the Settled Land Act, 1882, s. 2, sub-ss. 5 and 6,

because they are beneficially entitled to the rents and profits of the residuary real estate. In the alternative, it is submitted that these persons are together entitled to the powers of a tenant for life under s. 58, sub-s. 1, clause ix., of the Act. There is no express provision in s. 58, as there is in s. 2, sub-s. 7, that a number of persons comes within that clause, but by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1, it is provided that in such an enactment as the Act of 1882 the singular shall include the plural.

Whinney, for another defendant, referred to *In re Atkinson* (1), where the Court held that several persons who were the objects of a discretionary trust for distribution of rents and profits during the life of one of them did not together constitute a tenant for life under the Act, but Cotton L.J. intimated that there was no difficulty in assuming that s. 58 could apply to more persons than one.

G. Cave, for another defendant, referred to *Vine* v. *Raleigh* (2), where Chitty J. held that the executrixes of a deceased next of kin and a surviving next of kin had jointly the powers of a tenant for life within the meaning of s. 58.

J. M. Stone, for the remaining defendant.

KEKEWICH J. The Court is called upon to decide here an extremely interesting question under the Settled Land Act, 1882, which presents some features of novelty. [His Lordship stated the facts of the case, and continued:—]

It is obvious that on the dropping of any annuity by the death of the annuitant the person entitled to the income subject to the annuities will step into the place of the deceased annuitant, and be treated as being himself an annuitant to the extent of the share. Subject to all the annuities he is made tenant for life—that is to say, subject to the annuities the income is payable to him. Under the gift by reference to the Benetston estate, Norman Bennet comes in as first tenant for life, but he does not come in as tenant for life until all the annuities (except his own) have dropped, and he only takes the proportion which is represented by the annuities which

(1) (1886) 31 Ch. D. 577, 580. (2) [1896] 1 Ch. 37.

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have dropped, the result being that an annuitant of 10*l.* might be the survivor, and Norman Bennet would get the whole income except what was required to provide for the annuity of 10*l.*, and yet he would still be an annuitant. The question has been raised whether the annuitants are tenants for life. I proceed on the footing that this is an enabling Act and ought to be construed liberally, not meaning thereby that I am bound to find that somebody is tenant for life, but that the words of the Act are to be construed with a leaning towards the construction that there is a tenant for life. It is said that the annuitants are between them tenant for life under s. 2 of the Act, and if not, then that they have the powers of a tenant for life under s. 58. Either one or the other would be sufficient for the purposes of the applicants. I am not satisfied that these annuitants are a tenant for life. Sect. 2, sub-s. 5, says: "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement." There is no difficulty about the use of the singular, because, though the section says "the person," I think that, even without the next sub-section, it might well be held that "person" includes persons in the plural. But sub-s. 6 is as follows: "If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act." The annuitants are not beneficially entitled to possession in the ordinary sense of the word; but by sub-s. 10 (i.) "possession" includes receipt of income. Therefore I may read the 5th sub-section thus: "The person or persons who is or are for the time being, under a settlement, beneficially entitled to possession of settled land or to receipt of income for his or their life or lives is or are for purposes of this Act the tenant for life or tenants for life of that land, and the tenant for life or tenants for life under that settlement." There is no difficulty in the words "for his life," because if "person" is read as "persons," there is no difficulty in reading "for his life" as "for their lives." But my difficulty is to

know whether these annuitants can be strictly said to be entitled for their lives. Norman Bennet is not entitled to any annuity, because no annuity has dropped. Supposing one of the annuitants—say the widow—died, Norman Bennet steps in, because he is entitled to share in the surplus income. I will not say more than that there seems to me considerable difficulty in holding that the annuitants are entitled for their lives when to-morrow, on the dropping of one of the annuities by death, Norman Bennet would come in.

But leaving that, I have no hesitation in saying that the annuitants for the time being are persons having the powers of a tenant for life under s. 58. That section provides as follows: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely)." I have held that Norman Bennet is not entitled in possession, and therefore cannot have the powers of a tenant for life, and these annuitants are entitled in possession. Between them, they exhaust all the income of the property, because so long as an annuity is existing the income must be divided between them in certain proportions. Then clause ix. of sub-s. 1 of s. 58 is as follows: "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event." Now here we have a direction to trustees, who have powers of management given to them by the Conveyancing Act that, subject to expenses of management, they shall pay to these annuitants the income of the land during their lives. The question which struck me as one of difficulty under the earlier sections does not arise here. The only event which can displace these annuities is the death of one of the annuitants, when another comes in, so that each of them has simply a life interest on the determination of which Norman Bennet is to come into the class. The definition clause in s. 2, sub-s. 6, which imports the plural although the singular is used, may not, and probably does not, apply to

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s. 58. But more than one case has been referred to in which the singular has been held to include the plural, and in particular the case of *Vine* v. *Raleigh* (1), where Chitty J. held that a surviving next of kin and the executrixes of a deceased next of kin were persons having the powers of a tenant for life under s. 58. I think, therefore, without deciding that these annuitants are tenants for life, that the true view is that in this case the annuitants for the time being have the powers of a tenant for life under s. 58.

Solicitors: *Johnson, Weatherall & Sturt, for George Hadfield, Bennett & Carlisle, Manchester; Hare & Co.; Sharpe, Parker, Pritchards, Barham & Lawford; A. Toovey, for Bennett, Boycott, Orme & Goodman, Buxton.*

C. C. M. D.

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1903
May 7, 8.

BOOTLE GUARDIANS *v.* WHITEHAVEN GUARDIANS.

[1903 B. 385.]

Local Government—Union—Parish—Transfer of Land from one Parish to another—Alteration of Boundaries of Union—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 58.

Land forming part of parish D. in the poor law union of Bootle was, by order of the county council confirmed by the Lqcal Government Board, transferred to parish S. in the union of Whitehaven, and parish S. was transferred from the rural district of Whitehaven to the rural district of Bootle. The order did not purport to affect the boundaries of the unions:—

Held, that the whole of parish S., as enlarged by the order, was comprised within the union of Whitehaven.

ACTION.

The common law parish of Seascale was in the Whitehaven Poor Law Union in the county of Cumberland and adjoined the parish of Drigg and Carleton, which last-mentioned parish was wholly comprised within the Bootle Union. Seascale was a contributory place within the Whitehaven Rural Sanitary District, and Drigg and Carleton was a contributory place within the Bootle Rural Sanitary District.

(1) [1896] 1 Ch. 37.

By art. 1 of the County of Cumberland (Seascale, Drigg and Carleton) Confirmation Order, 1901, an order of the Local Government Board, confirming with certain modifications an order of the county council of Cumberland made pursuant to the Local Government Act, 1888, s. 57, sub-s. 1, a portion of the area comprised within the common law parish of Drigg and Carleton was added to the area comprised within the common law parish of Seascale; and by art. 2 of the order the whole of the area of the parish of Seascale, as extended by the order, was included in and made to form part of the Bootle Rural District, and the then existing boundaries of the Bootle and Whitehaven Rural Districts were altered accordingly. By art. 3 the present members of the parish councils of Seascale and of Drigg and Carleton were to continue in office until the next ordinary day of retirement, and the number to be elected in future was to be nine for Seascale, and eight for Drigg and Carleton. By art. 4, the person who at the date of the order was rural district councillor for the existing parish of Seascale was to represent that parish as altered by the order upon the Bootle Rural District Council instead of upon the Whitehaven Rural District Council; and the rural district councillors for the existing parish of Drigg and Carleton were to continue to represent that parish as altered by the order. By art. 6 the present overseers and assistant overseers of the poor were to continue in office. By art. 14 nothing in the order was to be construed as restricting the power of the Local Government Board under the Acts relating to the relief of the poor; and by art. 15 the order was to come into operation on September 30, 1901. The order did not mention or purport to make any change in the area of the poor law unions.

The guardians of the poor of the Whitehaven Union claimed that the order had extended the area of the Whitehaven Union so as to include therein the area which had been added to Seascale, and they issued precepts to the overseers of the parish requiring them to contribute to the union sums calculated on the parish as extended, and the overseers made rates accordingly. The guardians of the poor of the Bootle Union thereupon brought this action against the guardians of White-

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haven and the overseers of Seascale, and claimed a declaration that the part which by the order had been added to Seascale was still situated within and formed part of the Bootle Poor Law Union, and an injunction to restrain the defendants from levying rates in the added area.

The defendants contended that the order was valid, and that the added area now, as part of the parish of Seascale, formed part of the Whitehaven Union.

Levett, K.C., and *R. Cunningham Glen*, for the plaintiffs. The county council had no power under s. 57 of the Local Government Act, 1888, to alter the boundaries of the poor law unions. Sect. 57, sub-s. 1, gives a county council power to alter the boundaries of parishes and to transfer part of a parish to another parish, and to make orders for that purpose. These orders have to be confirmed by the Local Government Board, and by sub-s. 5 the Board may make modifications in them. There is nothing in the Act which gives county councils power to alter unions, and such a provision cannot be implied in s. 57; by s. 58 the Board can alter unions which are situated in more than one county, but that does not affect this question. The Board has power to alter unions under the Poor Law Amendment Acts (4 & 5 Will. 4, c. 76, s. 32; 7 & 8 Vict. c. 101, s. 66; 31 & 32 Vict. c. 122, s. 4; and 39 & 40 Vict. c. 61, s. 11). But this order was made by a county council, which has no such power. By s. 36, sub-s. 6, of the Local Government Act, 1894 (56 & 57 Vict. c. 73), a county council may alter a union for the purposes of that Act; but that does not enable it to do so for the purposes of such an order as this, which was made under the Act of 1888. The fact that it was thought necessary to insert that power in the Act of 1894 shews that they had not such a power previously. The area of unions was fixed once and for all by the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76). Unions consisted of parishes, and there was no power at that time to alter a parish, although afterwards power was given to the Local Government Board to transfer a parish as a whole, or part of a parish if it was situated in two counties.

This is analogous to cases under the Burial Acts, under which it has been held that if an order dividing a parish does not expressly alter the Burial Acts area, that area remains unaltered: *Reg.* v. *Keighley Overseers* (1); Macmorran on the Local Government Act, 1888, 3rd ed. p. 116.

If the county council had the power to alter the boundaries of the unions, it has not exercised it. The order contains nothing which in express terms purports to affect unions; and the Court will not imply in the order a provision for such an alteration if there is any doubt whether the county council could make it expressly. The alteration would cause the greatest possible inconvenience. District councillors and guardians of the poor are now the same persons, and the result of the change would be that the representatives of Seascale would be district councillors of the rural district of Bootle and guardians of the union of Whitehaven. That cannot have been intended.

Macmorran, K.C., and *Naldrett* (*Fleetwood Pritchard* with them), for the Whitehaven guardians. A parish cannot be situated partly in one union and partly in another. Unions were created by s. 26 of the Poor Law Amendment Act, 1834, and are composed of parishes. By s. 32 unions may be altered, but only by the transfer of whole parishes. A parish is an entire thing, and if land is added to it that land is in the union to which the parish belongs. There cannot be guardians for part of a parish; nor can a parish have different boundaries for different purposes. There is no analogy between a case on the Burial Acts and the present case, for a county council may, under s. 59, sub-s. 4, of the Local Government Act, 1888, alter an area formed under the Burial Acts: *Reg.* v. *Durham County Council* (2); Macmorran on the Local Government Act, 1888, 3rd ed. p. 116. A county council cannot alter the boundaries of a union, but it can alter the boundaries of a parish, and the legal consequences of the alteration must follow. The identity of the parish of Seascale has not been destroyed by the addition to its area of part of another parish, and the whole parish is in

(1) *Local Government Chronicle*, 1897, p. 47.
(2) *Local Government Chronicle*, 1897, p. 70.

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the Whitehaven Union: *West Ham Union* v. *London County Council*. (1)

Levett, K.C., in reply.

BYRNE J. stated the facts and referred to the arguments, and continued:—The section under which these proceedings were taken is s. 57 of the Local Government Act of 1888, and that provides that: "Whenever a county council is satisfied that a primâ facie case is made out as respects any county district not a borough, or as respects any parish, for a proposal for all or any of the following things—that is to say, (*a*) the alteration or definition of the boundary thereof; (*b*) the division thereof or the union thereof with any other such district or districts, parish or parishes, or the transfer of part of a parish to another parish"—then there are provisions providing for confirmation by the Local Government Board of any order made under this section, and giving power, for the purpose of carrying out the objects, to make modifications. By sub-s. 5 it is on confirming an order that the Local Government Board may make such modifications therein as they consider necessary for carrying into effect the objects of the order. The object of the order in the present case was to alter the boundary of the parish of Seascale by including therein a portion of the adjacent parish. Now it is pointed out that there is no power under the Local Government Act of 1888 for a county council to make any order changing the area of a poor law union as such. There is a provision in s. 58 giving power to the Local Government Board to make certain orders with reference to poor law unions situate in more than one county, and there are other Acts of Parliament, to which I need not refer, giving powers to the Local Government Board expressly under certain circumstances to deal with poor law areas. There is no doubt as to the effect of the order in this respect. A portion of one parish has been taken away and has been added to another parish. That is the legal effect: that was what was intended. What is the consequence of that with reference to the poor law union? The poor law union consists, and so far as I know always has

(1) [1902] 1 K. B. 562.

consisted, of parishes; and certainly in the Acts to which I have been referred these unions are made with reference to parishes. It is possible that under some more modern Acts there may have been special modifications; but, speaking generally, and in the absence of special modifications, that is a true statement. Now does that mean that a poor law union has to consist of parishes of the same area, and not only of the same area, but of the identical acres, of which it consisted at the time of its creation, unless expressly altered by some authority which has power to change the union? I think not: it appears to me that that union which formerly included the parish of Seascale still includes the parish of Seascale; and I do not see my way to holding that a portion only of the present parish of Seascale is within that poor law area.

One case I have been referred to which, although the point at issue was not the same, contains some useful observations on the subject. It is the case which came before the Court of Appeal of the *West Ham Union* v. *London County Council*. (1) A portion of a parish had been added to and amalgamated with a parish in which a pauper had previously acquired a settlement, and the question was raised whether the order had operated to destroy the identity of the parish to which the portion of the other parish had been added, and whether the settlement of the pauper remained unaffected or not. The present Master of the Rolls says, after referring to a case which had been mentioned in the course of argument (2): "All that has happened is that there has been an accretion to the parish, and, when we look at the legislation by which that has been acquired, it does not point to anything analogous to the division of a parish into separate parts." Then he refers to the section, and lower down he says: "If the matter before us were uncovered by authority, I should be of opinion that an order such as was made in the present case did not destroy the identity of either parish, so as to bring them within the line of cases which depend on loss of identity. We are not, however, without authority on the point." Then he says, after referring to *Reg.* v. *Inhabitants of St. Martin, New Sarum* (3): "This

(1) [1902] 1 K. B. 562. (2) [1902] 1 K. B. 565. (3) (1846) 9 Q. B. 241.

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case seems to me to fall outside the line of cases cited as authorities for the appellants' contention, which do not prevent us from saying that the mere accretion of a small portion of the parish of Wanstead to the parish of West Ham, where such accretion does not purport to destroy the identity of West Ham, does not in fact have that effect." Romer L.J. says (1): "The parish of West Ham has not been destroyed, but still exists as a parish, notwithstanding that some portion of another parish has been added to it." And Mathew L.J. takes a similar view. So that you may have a parish by virtue of a subsequent order added to, yet remaining a parish, and remaining a parish by the name which it before possessed for many purposes; and it appears to me that that is precisely the case here. The poor law union of Whitehaven still includes the parish of Seascale. The parish of Seascale is now of different dimensions, but the identity of the parish has not been destroyed.

Then it is said, and said truly, that there being no power to change the area of the union, the county council and the Local Government Board could not by this procedure do anything which should have that operation—which should have the operation of extending the area. I think the answer is that although the acreage is larger, the area reckoned by parishes is not increased. The parish area is not increased, although the actual acreage is increased. Why have they not power to do that? They have the power to change the parishes, as they did in this case, to add a piece of a parish to another, and there are no negative words in the Act saying that the effect of that shall not be to alter the acreage of the poor law area. There is no power given with reference to that matter; but there is nothing in the Act to negative the legal consequences resulting from the legal act done under the statute. There are, it is true, anomalies arising from the position, and, as I understand, the Local Government Board has powers to deal with matters of that description, and at any time an application can be made to invoke those powers, should the anomalies which have been referred to prove burdensome, or should the parties desire to alter them.

(1) [1902] 1 K. B. 567.

I ought not to part with the case without referring to *Reg.* v. *Keighley Overseers* (1); Macmorran on the Local Government Act, 1888, 3rd ed. p. 116. That was a case where there had been an alteration made in the boundaries of a parish under a burial board, and the order made did not alter the limits of the area over which the jurisdiction of the burial board extended. There were two points in the case. I need not refer to the first, but the second arose in this way: there was a provisional order made under the Act of 1888, confirmed by Act of Parliament, and the borough and parish of Keighley were extended as from November 9, 1895, so as to include among other added areas a further portion of the parish of Bingley. No reference was made in the Act or order to the jurisdiction of burial boards; but the order contained a clause providing that nothing therein should affect the ecclesiastical divisions of any parish. The learned judge, Wright J., said: "It is suggested that the taking of the area in question from the parish of Bingley must have the further effect of taking it from the area of the burial board. But in my opinion a burial board and its area are separate entities, and are not altered by an alteration of parish boundaries. To alter the area of a burial board provisions directed to that purpose are necessary. Here there is no provision of the kind." So that there having been power to alter the area, the learned judge came to the conclusion that, no such direction having been given, there was no alteration in the burial area. It appears to me that that does not really affect the present case at all; because this is not a case in which the county council could have said that the poor law unions should or should not be altered in any way. The action must be dismissed with costs.

Solicitors: *Leonard H. West, for John Clark, Broughton-in-Furness; Speechly, Mumford & Craig, for Atkinson & Bennett, Whitehaven.*

(1) *Local Government Chronicle*, 1897, p. 47.

H. C. R.

FARWELL J.

1903

March 27.

In re CORNWALLIS-WEST AND MUNRO'S CONTRACT.

[1903 W. 29.]

Settled Land—Settlement by Will—Tenant for Life—Jointure Deed under Power in Will—Mortgages by Tenant for Life—Re-settlement by Deed—New Life Estate "in Restoration of former Life Estate" under Will—Compound Settlement—Trustees for Purposes of Settled Land Acts—Power of Tenant for Life to Sell—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 2, 20, 38, 40, 50—*Settled Land Act*, 1890 (53 *&* 54 *Vict. c.* 69), *s.* 4.

In 1850 lands stood limited under a will to the use of A. for life, with remainder to his first and other sons successively in tail male. In 1872 A., upon his marriage and in exercise of a power given him by the will, by deed charged the lands with a jointure in favour of his wife. He also created mortgages on his life estate. In 1895 A. and his only son by a disentailing assurance conveyed the lands to such uses as A. and his son should by deed jointly appoint; and by a deed of even date they appointed the lands to the use of A. for life "in restoration and continuation of his former life estate under the will," with remainder to the son in fee simple, and by this deed trustees were appointed for the purposes of the Settled Land Acts. A., as tenant for life under the resettlement of 1895, contracted to sell part of the lands, the jointress and mortgagees being willing to concur and release their interests in the conveyance to the purchaser:—

Held, that A.'s life estate under the will was still subsisting; that the will, jointure deed, disentailing assurance, and resettlement together constituted one compound settlement of which there were no trustees for the purposes of the Settled Land Acts, and therefore that A. could not make a good title.

In re Mundy and Roper's Contract, [1899] 1 Ch. 275, followed.

By an agreement in writing dated November 5, 1902, and made between W. C. Cornwallis-West (the vendor) of the one part, and E. L. W. Munro (the purchaser) of the other part, the vendor agreed to sell and the purchaser agreed to purchase certain freehold land at Milford-on-Sea, in the county of Southampton, forming part of a settled estate known as the Newlands Manor estate. The vendor entered into the agreement and was in fact selling as tenant for life under the Settled Land Acts.

The title of the vendor, as shewn by the abstract furnished to the purchaser, was shortly as follows:—

By the will dated August 26, 1841, of M. A. T. Whitby, widow, who died in August, 1850, the Newlands Manor estate was limited to the use of the vendor for life, with remainder to the use of his first and every other son successively in tail male, with remainders over; and by the will the vendor was empowered either before or after marriage by deed to appoint unto any woman whom he might marry a jointure not exceeding 400*l.* per annum, to be charged upon the lands thereby devised in strict settlement, and to limit and appoint the hereditaments so to be charged to any person or persons for any term of years for better securing the jointure.

By his marriage settlement dated October 2, 1872, the vendor appointed to his wife (who was still living) an annual rent-charge of 400*l.* charged on the lands devised in strict settlement by the will, and appointed the said lands to trustees for a term of years for better securing the same.

By mortgages created in the years 1868, 1888, 1889, and 1891 the vendor charged his interest in the lands so devised in strict settlement with divers sums of money, all which mortgages were still subsisting.

By a deed dated November 15, 1895, and made between the vendor of the first part, G. F. M. Cornwallis-West (the first and only son of the vendor) of the second part, and E. W. Vaughan and M. B. Lawford of the third part, and duly enrolled as a disentailing assurance, the vendor and his said son conveyed the said lands unto the said E. W. Vaughan and M. B. Lawford and their heirs to hold the same, subject to all charges and terms of years which were prior to the estate tail of the vendor's son, and to all incumbrances affecting the life estate of the vendor, but freed and discharged from such estate tail and from all subsequent estates or interests, to such uses, upon such trusts, and subject to such powers, provisoes, and declarations as the vendor and his son should by deed jointly appoint; and, in default of appointment, to the uses, upon the trusts, and with and subject to the powers, provisoes, and declarations which were subsisting or capable

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of taking effect in the same premises immediately before the execution of the now stating indenture, so as to restore and confirm the same uses, trusts, powers, and declarations.

By another deed, also dated November 15, 1895, and made between the vendor of the first part, the vendor's said son of the second part, the said E. W. Vaughan and M. B. Lawford of the third part, and W. W. Vivian and G. Wyndham of the fourth part, after reciting (inter alia) the said mortgages of the vendor and an arrangement as to the payment of the same, it was witnessed that for the purpose of effectuating the said arrangement, and in exercise of the power given to them by the said disentailing assurance, the vendor and his son did thereby appoint (inter alia) the said lands to such uses, upon such trusts, and with and subject to such powers and provisoes as the vendor and his son should by deed jointly appoint; and, in default of and subject to any such appointment, to the use that the vendor's son should receive a yearly rent-charge of 500*l.*; and subject and charged as aforesaid, to the use of the vendor for his life without impeachment of waste in restoration and by way of continuation of the former life estate of the vendor under or by virtue of the said will, and from and after the decease of the vendor to the use of the vendor's son in fee simple; and by the now stating indenture it was declared that the said W. W. Vivian and G. Wyndham and the survivor of them, and the executors or administrators of such survivor or other the trustees for the time being of the now stating indenture, were thereby appointed to be trustees or trustee thereof for all the purposes of the Settled Land Acts, 1882 to 1890.

The purchaser objected to the title on the ground (as the facts were) that there were no trustees for the purposes of the Settled Land Acts of the settlement created by the said will, or of the compound settlement created by the will, the jointure deed, and the two deeds of November 15, 1895, and required that such trustees should be appointed, and that they should join in the conveyance and give a discharge for the purchase-money. The vendor, on the other hand, contended that such appointment was unnecessary, because there were (as the fact

was) trustees for the purposes of the Settled Land Acts of the deed of November 15, 1895, and they would receive the purchase-money, and because the vendor's wife, in respect of her jointure under the settlement of October 2, 1872, would join in the conveyance to release the land agreed to be sold from the jointure. The said mortgagees of the vendor's life interest were also willing to concur in the conveyance. The purchaser thereupon took out a summons under the Vendor and Purchaser Act, 1874, claiming a declaration that a good title had not been shewn to the property.

Upjohn, K.C., and *Popham*, for the summons. We contend that under s. 2 of the Settled Land Act, 1882, and s. 4 of the Settled Land Act, 1890, the four instruments in question, namely, the will, the jointure deed, the disentailing assurance, and the resettlement together constitute one compound settlement, because they are all instruments which have a present influence on the settlement. The case of *In re Marquis of Ailesbury and Lord Iveagh* (1) is directly in point, and was approved of by the Court of Appeal in *In re Mundy and Roper's Contract* (2); and the vendor cannot make a title unless trustees of this compound settlement are appointed by the Court for the purposes of the Settled Land Acts: *In re Spencer's Settled Estates.* (3) The case of *In re Du Cane and Nettlefold's Contract* (4) is distinguishable. The effect of the resettlement of 1895 was to restore to the vendor his old life estate under the will with all its appendant powers: s. 50 of the Settled Land Act, 1883; *In re Wright's Trustees and Marshall* (5); so that the will is an effective and operative part of the settlement. The vendor is in this practical difficulty. He can sell under the will, but there are no trustees to receive the purchase-money: Settled Land Act, 1882, ss. 38, 40. On the other hand, if he sells under the resettlement of 1895, then s. 20 of the Act applies, and he cannot overreach the jointure deed or the mortgages.

(1) [1893] 2 Ch. 345.
(2) [1899] 1 Ch. 275.
(3) [1903] 1 Ch. 75.
(4) [1898] 2 Ch. 96.
(5) (1884) 28 Ch. D. 93.

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Butcher, *K.C.*, and *Austen-Cartmell*, for the vendor. The parties do not desire that the purchase-money should be paid into court. The real question is not whether the vendor can or cannot sell, but whether the old life estate under the will is still in existence. We submit it is not. By the disentailing assurance the vendor and his son conveyed the entire fee to such uses as they should jointly appoint. Under that deed the old life estate under the will was merged and extinguished in the fee. Then the resettlement created an entirely new settlement and an entirely new life estate. The words "in restoration and continuation of the life estate under the will" were not intended to revive the old life estate, but only to keep alive the powers incident to that life estate. They are purely formal, and their use is explained in Davidson's Precedents, 3rd ed. vol. iii. p. 594; *Hill* v. *Pritchard*. (1) The decision in *In re Mundy and Roper's Contract* (2) is really in our favour, for it shews conclusively that there may be at the same time a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one only of the deeds. *In re Du Cane and Nettlefold's Contract* (3) is to the same effect. That is the case here. The resettlement of 1895 is a settlement under s. 2 of the Settled Land Act, 1882, and the vendor is a person who satisfies the definition of a tenant for life in sub-s. 5 of that section; and as tenant for life under that settlement he can exercise all the powers of a tenant for life under the Act and can sell. It is true he cannot overreach the jointure and mortgages; but that is not material here, because the jointress and the mortgagees will join in the conveyance to the purchaser and release their interests.

FARWELL J. It is sufficient for me to say that, in my opinion, the old life estate in this case has been restored—that is to say, that the life estate created by the will of Mrs. Whitby is still the life estate that is now in existence; in saying this I am simply following the decision of Pearson J.

(1) (1854) Kay, 394. (2) [1899] 1 Ch. 275.
(3) [1898] 2 Ch. 96.

in *In re Wright's Trustees and Marshall* (1), which was approved by Stirling J. in *In re Du Cane and Nettlefold's Contract* (2); and it also accords with the view expressed by Chitty L.J. in *In re Mundy and Roper's Contract* (3), where his Lordship expressly insists upon the fact that the life estate in that case was not in terms limited to the life tenant in restoration of his old life estate, and he says (4): "The object of this restoration is well known; it was to keep alive the old powers annexed to the life estate." Having once arrived at this opinion, it seems to me clear that in the present case "the settlement" within the meaning of the Settled Land Acts, 1882 to 1890—the only settlement, in short, under which the vendor is able to exercise his statutory power of sale—must be the compound settlement consisting of the will, the deed of jointure, the disentailing assurance, and the deed of resettlement. It follows that unless trustees are appointed of this compound settlement for the purpose of receiving the purchase-money, the vendor cannot make a good title. I understand that the parties do not wish the purchase-money to be paid into court.

Solicitors for purchaser: *Woodcock Ryland & Parker, for Preston & Francis, Bournemouth.*

Solicitors for vendor: *Patersons, Snow & Co.*

(1) 28 Ch. D. 93.
(2) [1898] 2 Ch. 96.
(3) [1899] 1 Ch. 275.
(4) Ibid. 294.

H. L. F.

FARWELL J.

1903

March 28.

In re ERMEN.
TATHAM *v.* ERMEN.

[1901 E. 1935.]

Practice—Costs—Taxation—"Instructions for Originating Summons"—Rules of Supreme Court, Order LXV., *rr.* 8, 27, *sub-rr.* 29, 37—*Appendix N, No.* 65—*Order of January*, 1902, *r.* 10—*Practice Notes of the Masters of Hilary Sittings*, 1902—*The "Blue Book"—Discretion of Taxing Officer.*

Under rule 8 of Order LXV., and rule 10 of January, 1902 (which is the new sub-rule 29 of rule 27 of the same order), the discretion of the taxing officer is no longer limited to the maximum fee prescribed by Appendix N; but under these regulations he has now on every taxation a two-fold discretion—first, in ordinary cases, the discretion conferred on him by Appendix N, and, in addition to that, a general discretion in special cases to allow all such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party.

The Practice Notes of the Masters of Hilary Sittings, 1902—known as the "Blue Book"—though framed and issued by them under the power conferred on them by sub-rule 37 of rule 27 of Order LXV., have no statutory authority, and do not abrogate or fetter the discretion given them by the Rules of the Supreme Court. They merely define the practice which, as a general rule, should be followed by the masters on taxations.

McIver & Co., Ld. v. *Tate Steamers, Ld.*, [1902] 2 K. B. 184, followed.

SUMMONS to review taxation.

In June, 1901, the trustees of the will of F. J. Ermen, deceased, took out an originating summons in the Manchester District Registry for the determination of various questions arising on the said will; and by an order made on the hearing of the summons in August, 1901, the costs of all parties as between solicitor and client were directed to be taxed and paid out of the estate.

In due course the solicitors of the plaintiffs carried in their bill of costs for taxation, and the first item therein was as follows:—

"1901. June 18th. Attending the executors in long conference on various questions raised on

the will of the above deceased. Perusing will, agreement dated March 31st, 1896, bond, mortgage of policies, and several accounts at length. Taking instructions for originating summons. Several attendances upon the executors in connection herewith . . . . . £5 5 0."

The taxing master taxed off 4*l.* 4*s.* from this item, being of opinion that he was bound by item No. 65 in Appendix N of the Rules of the Supreme Court and the Practice Notes of the Masters of Hilary Sittings, 1902, to allow 1*l.* 1*s.* only. The plaintiffs objected that he had a discretion in the matter under Order LXV., r. 27, sub-r. 29. The taxing master, in overruling the objection, gave the following grounds and reasons :—

"If I have any discretion to increase this item beyond 1*l.* 1*s.*, then I think that the fee of 5*l.* 5*s.* charged in this case is quite reasonable ; but in my opinion I have no such discretion.

"The item is No. 65 in Appendix N of the Supreme Court Rules, and reads : 'For originating summons 6*s.* 8*d.*, or not to exceed 1*l.* 1*s.*'

"Years ago it was urged upon me that, notwithstanding the words 'not exceeding,' I had a discretion under Order LXV., r. 27 (3), to increase this fee, and, although I thought not, I wrote to the late Taxing Master Ryland and asked his opinion. He wrote that there was no discretion to increase this fee, nor to allow any preliminary items.

"It is now urged that the new rule, Order LXV., r. 27, sub-r. 29, gives me a discretion to increase this fee, which I had not before, and that the case of *McIver & Co., Ld.* v. *Tate Steamers, Ld.* (1), is an authority for that.

"First, as to *McIver & Co., Ld.* v. *Tate Steamers, Ld.* (1), I had in August last a correspondence with Master Baker on this and other matters connected with what is now generally known as the 'Blue Book'—i.e., 'Practice Notes on Taxation of Costs settled by the Masters in Hilary, Easter, and Trinity Sittings, 1902,' of which he had sent me a proof. In a letter of 7th August he says : '*McIver & Co., Ld.* v. *Tate Steamers, Ld.* (1), which was one of my cases, is rather liable to be

(1) [1902] 2 K. B. 184.

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misunderstood, and, as reported, is in conflict with *In re Harrison* (1) as to maximum fees. . . . We regard Appendix N as still binding on us. It will be noticed that he speaks for all the masters.

"Next, as to the new rule, Order LXV., r. 27, sub-r. 29. I have several times carefully compared it with the old rule for which it is substituted, and cannot see how it can be said to enlarge the discretion of the taxing master.

"But, further, the Rules of the Supreme Court' are as much part of the Act, and of the will of the Legislature in the passing of the Act, as any section in the Act itself': per Lord Blackburn in *Garnett* v. *Bradley*. (2) Now this very rule is part of a body of rules of January, 1902, intended to secure uniformity of practice on taxations, and with that object incorporating the Chancery taxing masters and the King's Bench taxing masters in one new department called the Taxing Department of the Supreme Court, and, still further to secure that object, making the following addition to Order LXV., r. 27, sub-r. 37: 'But the taxing masters shall have power to revise and regulate the practice in regard to taxation of costs, and to the allowance of fees so as to assimilate the allowances for costs, and to secure uniformity upon all taxations so far as may be practicable and expedient'; and it is in exercise of this power, as I take it, and with the above object, that the taxing masters have issued the above-mentioned Blue Book, which seems to me therefore to have almost, if not complete, statutory authority. In that book, on p. 19, under the heading 'Instructions,' they say, 'For originating summons, the maximum of 1*l.* 1*s.* under Appendix N, No. 65, will not be exceeded.'"

The plaintiffs took out a summons to review the taxing master's decision.

Haldane, K.C., and *A. G. Roby*, for the summons. The registrar was wrong in his view as to the construction of the rule. His discretion is not limited to Appendix N, nor by the Blue Book. *In re Harrison* (1) does not apply. Rule 8 of

(1) (1886) 33 Ch. D. 52. (2) (1878) 3 App. Cas. 944, 964.

Order LXV. directs that the scale in Appendix N is to be followed, "except as by this order otherwise provided for." That brings in the new sub-rule 29, which is an overriding declaration, and gives the taxing master power in every taxation, whenever he thinks that it is a case in which it would be reasonable and proper to do so, to allow a higher fee than the scale provides, and there is no maximum limit. Here he has said that 5*l.* 5*s.* was a reasonable fee. The old sub-rule 29 was limited to taxation between party and party, whereas the new sub-rule extends to every taxation. The point is really decided by the judgments of the Court of Appeal in *McIver & Co., Ld.* v. *Tate Steamers, Ld.* (1) It is submitted that rule 8 can be read quite consistently with sub-rule 29, which is rule 10 of January, 1902. Rule 8 gives in Appendix N the general scale of costs, and then sub-rule 29 gives the taxing master a wider discretion in a proper case to allow all such costs, charges, and expenses as are reasonable. Otherwise great injustice might be done, for one can conceive an originating summons where there might be an enormous mass of materials and evidence to be got in order to put the matter right, and one hundred guineas might be an inadequate fee. As to the Blue Book, sub-rule 37 does not give the taxing masters power to make formal rules which shall have the effect of abrogating or limiting their discretion in all cases. It is a valuable guide to the general body of taxing officers, but it has no statutory effect.

George Lawrence, for the defendants. It was not pointed out to the Court of Appeal in *McIver & Co., Ld.* v. *Tate Steamers, Ld.* (1), that the case there was not within Appendix N at all; and in this respect the decision is unsatisfactory, and the judgments really resolve themselves to a large extent into dicta. I agree that *In re Harrison* (2) does not apply. On the construction of the rule, I submit that the new sub-rule 29 was not intended to abrogate rule 8. The old sub-rule 29 only applied to party and party costs; the new sub-rule applies to "every taxation," that is, whether party and party or solicitor and client costs. In other words, the system which

(1) [1902] 2 K. B. 184. (2) 33 Ch. D. 52.

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formerly was only to be applied to a taxation between party and party is now to be applied in the affirmative to all taxations. That is the only alteration made by the new rule, which was not intended to override rule 8. The words "except such as are by this order otherwise provided for" refer to the class of cases mentioned in sub-rules 3, 4, 9, 10, 12, and 17*a* of the order, and there may be others; but sub-rule 29 is not within the excepted class of cases. But if it is, then it means that Appendix N is to be the scale for every taxation, and it does not confer on the masters a wider discretion as to a maximum than they had before. If the plaintiffs' contention is right, rule 8 is now absolutely meaningless; but it is submitted that rule 8 stands, and that the new sub-rule 29 makes no difference at all in the discretion of the taxing master when it is a case under Appendix N; the only alteration is in the number of cases to which that scale is to be applied. As to the Blue Book, sub-rule 37 gives the taxing masters power to regulate the practice in regard to taxation of costs and allowance of fees, so as to secure uniformity, and what they have done by this book is to define the limits within which as a general rule the discretion they have got shall be exercised. That is not, it is submitted, limiting the discretion, but regulating it as a matter of practice.

FARWELL J. In this case the learned registrar, after consulting the taxing masters in London, was of opinion that he had no discretion to allow more than the maximum of 1*l.* 1*s.* prescribed by Appendix N, No. 65, or by the Blue Book; although, if he had had such a discretion, he considered that the fee of 5*l.* 5*s.* claimed was proper and reasonable, and ought to be allowed. In my opinion, on the construction of the rules, apart from any question of authority, the learned registrar and the taxing masters have not taken the right view. Now Order LXV., r. 8, is a rule of old standing, and contains negative words: "In causes and matters commenced after these rules come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'Lower Scale' in Appendix N in all causes and matters, and no higher

fees shall be allowed in any case, except such as are by this order otherwise provided for." Turning on to find what are "otherwise provided for," I find a fasciculus of sub-clauses headed "Special allowances and general regulations," 58 in number, contained in rule 27. One of those sub-rules is No. 29. In the old rules which were in force before January, 1902, sub-rule 29 was expressed in the negative. There was, first, rule 8, with the negative words: "No higher fees shall be allowed in any case except such as are by this order otherwise provided for"; and then the old sub-rule 29, which said: "As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper," and so on. But in January of last year it was thought fit to alter that sub-rule and to put it into an affirmative form. I think it is fair to infer that when eminent persons like the Rule Committee alter the phraseology of a rule they intend to alter the substance also. When you are dealing with a set of sub-rules under the head "Special allowances and general regulations," which involve or may involve an exception to the negative words in rule 8, "No higher fees shall be allowed, &c.," and you find only a negative sub-rule that such and such a thing shall not be allowed, it is impossible to hold (and in fact the contrary was held) that under those regulations the maximum limit fixed in Appendix N can be exceeded. But when those negative words in the sub-rule are altered into the affirmative, and become an express power or direction that "on every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice," and so on, then, having regard to the collocation in which you find them, it appears to me that the Rule Committee did intend to give the general discretion which the words import. If I am to adopt the taxing master's view, I have to read into the new sub-rule 29, after the words "shall allow all such costs, charges, and expenses as shall appear to him, &c.," the words "not exceeding the limit fixed in Appendix N." But this sub-rule is in itself one of the set of regulations which are themselves the exceptions referred to in

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rule 8, "except such as are by this order otherwise provided for." This being so, I can see no difficulty in giving a general discretion to the taxing officer of the Court to be exercised in exceptional cases, in addition to the ordinary discretion which is bounded by a maximum and minimum; I see no reason why he should not have a two-fold discretion, namely, a discretion to allow the maximum or minimum, or something between the two, and, in addition to that, in special cases a general discretion to allow "all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." That appears to me to be the true construction of rule 8 and the new sub-rule 29, nor do I find anything contrary to that in the addition to sub-rule 37. The object of that sub-rule—I am entitled to state the mischief which was aimed at and intended to be abrogated by that sub-rule—was this. It was said that the costs allowed in the King's Bench Division were allowed on a less liberal scale than in the Chancery Division, and it was desirable that both should be assimilated so that the suitors should not have any reason for preferring one Division to the other, and accordingly sub-rule 37, having prescribed that the old original rules and practice of the old Courts as to costs should remain in force, added the new words: "But the taxing masters shall have power to revise and regulate the practice in regard to taxation of costs, and to the allowance of fees so as to assimilate the allowance for costs, and to secure uniformity upon all taxations so far as may be practicable and expedient." Now, there are no words there authorizing the taxing masters to fix an absolute minimum or maximum so as to deprive themselves of the discretion which I have already held they have received under the new sub-rule 29, and it would be somewhat extraordinary if these new words of sub-rule 37 had given the taxing masters power beyond and in abrogation of that contained in the sub-rule itself, and a greater power than is contained in Appendix N. In my opinion, the intention of those new words was to enable the taxing masters for the sake of uniformity and as a general rule to follow the same lines, and for that purpose to settle rules which would be the ordinary

rules by which they would be guided, but leaving them in special cases the unfettered discretion given them by the new sub-rule 29. That is my opinion on the construction. It was, perhaps, unnecessary for me to give this judgment, because I consider that I am bound by the decision of the Court of Appeal in *McIver & Co., Ld.* v. *Tate Steamers, Ld.* (1) Even if that decision were open to some of the criticisms that Mr. Lawrence has bestowed upon it, the argument presented to the Court there was exactly the same as the argument presented to me here, and the decision is binding on me. The question there turned on the allowance to a country solicitor for attending. The words were the same as the words relied on in the present case, and that was the point argued. Whether or not other points were argued is not material for me to consider. Mathew L.J. says (2): "It is argued that under the rules the master had no discretion to allow these costs. According to the practice as to taxation of costs between party and party prior to the Rules of January, 1902, the scale given in Appendix N was no doubt binding on the master, and this allowance could not have been made. But, on consideration of the objections to this rule, it was thought desirable to modify it to some extent, and accordingly the new rule 10 of the Rules of the Supreme Court, January, 1902, was made, by which it is provided that 'regulation 29 of Order LXV., r. 27, is hereby annulled, and the following regulation is substituted therefor.'" Then he reads the new one, and goes on: "We are asked to construe this rule as meaning that the taxing master shall allow no costs, charges, or expenses beyond those provided for by the scale given in Appendix N. The new regulation was framed with full knowledge of the terms of the old regulations and of the scale, and it cannot, I think, be doubted that it ought to be construed according to its terms, namely, as giving the master on 'every taxation' discretion to allow such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." Mr. Lawrence seized on the words "every taxation." It is quite true that the words of the rule are altered so that it

(1) [1902] 2 K. B. 184. (2) [1902] 2 K. B. 188.

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extends now to every taxation, and not merely to party and party taxation; but that is not to my mind the only part of the new rule, or, indeed, the gist of the alteration. The gist of the alteration is, as I have already pointed out, the substitution of an affirmative power, for the purpose of enabling the creation of an exception within the words of rule 8, in place of the old negative words. I consider that in any case I am bound by the decision of the Court of Appeal, and I do not follow the distinction which Master Baker has given. I will make a declaration that the taxing master had the discretion to allow this item.

Solicitors for plaintiffs: *Wheatly, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for defendants: *Bower, Cotton & Bower, for Aston, Harwood & Somers, Manchester.*

H. L. F.

Applied. WRIGHT *v.* MACADAM. [1949] 2 K. B. 744

Applied. WRIGHT *v.* MACADAM. [1949] 2 All E.R. 565.

INTERNATIONAL TEA STORES COMPANY *v.* HOBBS.

FARWELL J.

1903

April 23, 24, 25.

[1902 I. 1693.]

Easement—Way—Permissive Enjoyment—General Words—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-s.* 2—*Ways enjoyed with the Land sold.*

The general words incorporated by the Conveyancing Act, 1881, in every conveyance not expressing a contrary intention, will pass to the purchaser all ways actually used by him at the date of the conveyance, though used only by permission of the vendor.

The defendant in this action was the owner of two houses adjoining each other, one in his own occupation, the other held by the plaintiff company under a lease from the defendant, and occupied by their managers and servants carrying on their business. The houses were separated by a roadway leading to and forming part of the defendant's yard. By permission of the defendant, renewed from time to time to successive managers, the plaintiffs' servants and their predecessors in title had used in business hours a way across the yard to a door opening thereon in the back part of their premises for all purposes of their business. The entrance to the yard was closed by wooden doors, which were always locked by the defendant at night, and he kept sole control of the key. The defendant sold to the plaintiff company the house leased to them, and conveyed it by a deed containing no general words or reference to any right of way:—

Held, that such a right of way as the plaintiffs had actually enjoyed at the date of the deed passed to them by virtue of the general words inserted in the deed by the Conveyancing Act, 1881, though the enjoyment was wholly permissive and precarious.

THIS action was brought by the plaintiff company to restrain the obstruction by the defendant of a right of way claimed by the plaintiff company to the back of their house, shop, and premises in Chapel Street, Petersfield, over the yard of the adjoining house owned and occupied by the defendant.

Until 1889 the defendant was the owner of both houses. On June 17, 1890, he leased the plaintiffs' premises to Kearley & Tonge for twenty-one years from March 25, 1891. The premises were described in the lease as "A piece or parcel of land situate at Petersfield, in the county of Southamption, abutting on and having a frontage of twenty-six feet or thereabouts to Chapel Street on the west, and bounded by a brook or stream towards the north, together with the messuage or dwelling-house,

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shop, or premises erected or built on the piece of land hereby demised." The stream referred to formed the boundary between the two houses of the defendant. It had before the date of the lease been arched over for some distance from Chapel Street, and a roadway made over the arch. This roadway led to and formed part of the yard belonging to the house occupied by the defendant. He carried on the business of a blacksmith in a smithy in the yard. There was a side door in the south wall of the garden or yard at the back of the demised premises opening into this yard, which was the only access to the back of these premises except through the shop in front. The yard was originally separated from Chapel Street by a wall in which there was no door. Shortly before the date of the lease an opening was made in the wall to enable the tenant of the plaintiffs' premises to carry in some heavy machinery. Afterwards, before the date of the conveyance to the plaintiff company, wooden doors or gates were fitted to this opening.

On December 4, 1895, the lease was assigned to the plaintiff company, and they took possession and continued the business of tea-dealers and grocers which had been carried on by the lessees. The company's business was carried on by successive managers, who resided on the premies.

In 1895 the plaintiff company purchased the freehold of the premises from the defendant, and in the conveyance to them, dated December 4, 1895, the premises were described as "All that piece or parcel of land situate at Petersfield, in the county of Southampton, being the northern portion of a piece of land comprised in and demised by an indenture therein mentioned (which was a lease for 1000 years which had been merged in the reversion), and more particularly described in the map or plan drawn in the margin hereof and therein coloured pink, and which piece of land intended to be hereby conveyed has a frontage of twenty-six feet or thereabouts to Chapel Street, and abuts thereon towards the west, and is bounded towards the north by a roadway constructed over a brook or stream leading to a yard and blacksmith's shop of the defendant, and towards the east and south (as therein mentioned), together with the messuage or dwelling-house, shop, and premises erected and

built on the said piece of land, all which premises are now in the occupation of the company."

The conveyance contained no general words, and nothing to shew any intention to exclude the Conveyancing Act. The plaintiff company alleged that at the date of the conveyance, and for some time before, they and the original lessees had used as of right a way across the yard to the door at the back of their premises for all purposes of their business, and claimed that this right of way passed by this deed by virtue of the Conveyancing Act. (1)

There was a conflict of evidence as to the enjoyment of this right of way, but the judge found as a fact that the plaintiff company's managers and employees had for some years before the date of the conveyance used a right of way on foot and with a hand-cart for all the purposes of their business, and also for the use of the house as a residence by the managers, between the hours of 6 A.M. and 10 P.M. on ordinary week-days and 6 A.M. and 8 P.M. on Saturdays, the doors into Chapel Street being kept locked by the defendant at night and on Sundays; that this way was occasionally obstructed to a certain extent by carts which were brought into the yard for the purposes of the defendant's business, but there was no systematic obstruction; that the enjoyment was by permission only, fresh verbal permission having been given by the defendant to each successive manager of the plaintiff company when he took possession of the premises, but not on every occasion on which the way was used.

Upjohn, K.C., and *Vernon*, for the plaintiffs. The right of way claimed was used by the plaintiff company's managers and employees at the date of the conveyance, and it therefore passed

(1) Sect. 6, sub-s. 2: "A conveyance of land having houses . . . . thereon shall be deemed to include and shall by virtue of this Act operate to convey with the land . . . . all . . . . ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, ... or at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."

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by express grant under the general words incorporated in the conveyance by s. 6, sub-s. 2, of the Conveyancing Act, 1881.

Watts v. *Kelson* (1) and *Kay* v. *Oxley* (2) are direct authorities that these words will carry such a right. But, apart from the express grant, the existence of the made road would under the circumstances, having regard to the construction of the premises and the impossibility of conveniently using the house as a whole without it, be sufficient to establish an implied grant: *Watts* v. *Kelson*. (1)

On the first point *Kay* v. *Oxley* (2) is important, because in that case the way had been enjoyed by licence only, and Blackburn J. treated that as immaterial. *Barkshire* v. *Grubb* (3) and *Bayley* v. *Great Western Ry. Co.* (4) are to the same effect. The only question is, Was the road in fact used at the date of the conveyance and for a short time before? *Brown* v. *Alabaster* (5) shews the way would pass by implied grant.

Lord Coleridge, K.C., and *A. Adams*, for the defendant. The plaintiffs appear to claim a general right of way without limit; but it is admitted that the gate was locked at night, and the evidence proves that it was closed according to the convenience of the defendant's business without any regard to that of the plaintiff company. There was no continuous easement: all the user there was was permissive only; the evidence does not shew how far the permission extended.

[FARWELL J. Does not the fact that the land is described as bounded by a roadway estop the vendor from denying that there is in fact a road there?—*Roberts* v. *Karr*. (6)]

The road is described as leading to the vendor's yard, not to the plaintiffs' premises. Access to the plaintiffs' premises was constantly obstructed by carts brought into the defendant's yard for the purposes of his business. The Court will not imply a grant inconsistent with the intention of the parties shewn by the circumstances: *Birmingham, Dudley and District Banking Co.* v. *Ross* (7); *Godwin* v. *Schweppes, Limited*. (8) A

(1) (1871) L. R. 6 Ch. 166.
(2) (1875) L. R. 10 Q. B. 360.
(3) (1881) 18 Ch. D. 616.
(4) (1884) 26 Ch. D. 434.
(5) (1887) 37 Ch. D. 490.
(6) (1809) 1 Taunt. 495; 10 R. R. 592.
(7) (1888) 38 Ch. D. 295.
(8) [1902] 1 Ch. 926.

merely precarious easement will not pass under the general words implied by the Conveyancing Act: *Burrows* v. *Lang*. (1)

[*Upjohn, K.C. Birmingham, Dudley and District Banking Co.* v. *Ross* (2) is explained in *Broomfield* v. *Williams*. (3)]

There must be some certain and definite user as of right. *Kay* v. *Oxley* (4) is the only case where permissive user is referred to, and there the purchaser had built a loft after consultation with and by permission of the landlord to which the way in question was the only access. *Bayley* v. *Great Western Ry. Co.* (5) was not a case of permissive user. In *Barkshire* v. *Grubb* (6) the vendor had compelled the plaintiff to purchase the right of way in dispute. In *Watts* v. *Kelson* (7) Mellish L.J. explains that there was a continuous and apparent easement.

Upjohn, K.C., in reply.

[He was stopped by the Court.]

FARWELL J. (after stating the description of the land in the conveyance). Now, having got this conveyance of land with this description of boundaries, the Conveyancing Act, in the absence of any contrary intention expressed in the deed, provides that the conveyance shall be deemed to include, and shall by virtue of this Act operate to convey with the land (amongst other things), all ways, privileges, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof. I am, therefore, thrown back on the inquiry whether it is or is not the fact that at the date of the conveyance the way in question was a way used and enjoyed with the property conveyed. If it was so in fact used and enjoyed, then it passed to the plaintiffs by the very words of the grant.

Now the facts are these. Mr. Hobbs owned the property on

(1) [1901] 2 Ch. 502.
(2) 38 Ch. D. 295.
(3) [1897] 1 Ch. 602, 613.
(4) L. R. 10 Q. B. 360.
(5) 26 Ch. D. 434.
(6) 18 Ch. D. 616.
(7) L. R. 6 Ch. 166.

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both sides of the roadway or yard in question, and in 1888 or 1889 let the plaintiffs' premises to Mr. Sharpe. He allowed Mr. Sharpe to make a hole in the wall which then bounded the roadway, for the purpose of carrying in some printing presses. That opening in the wall was there at the date of the lease to the plaintiffs' predecessors in title. A door was afterwards put there, but at the date of the lease there was no doorway—nothing but a hole in the wall—and the lease, which was dated in 1890 and commenced in 1891, does not, as does the conveyance, refer to a roadway constructed over a brook as one of the boundaries of the demised property, but refers to the brook itself. I think, therefore, that on the true construction of the lease the predecessors in title of the plaintiffs did not get any right of way by demise over this particular roadway. But after they had entered under their lease, their first manager, Mr. Gardner, obtained permission from Mr. Hobbs to use the roadway which was then constructed into Chapel Street from the door in the wall of the plaintiffs' premises; that permission was asked for and given once for all to Mr. Gardner. Two succeeding managers obtained a like permission in the same way.

In 1895 the plaintiff company took an assignment of the lease, and took over and carried on the business of the original lessees, and I find as a fact that their first manager also obtained from the defendant a like permission to go on using this road in the same way in which it had been used before.

There has been a considerable conflict of testimony on the subject of user, but I find as a fact that the roadway has been used for all purposes of the company's business whenever they wanted to use it, not merely for packages, but also for the purpose of carrying coals in for the use of the manager, or whoever resided on the premises, when he did so reside; and for the purpose also of carrying out the wood which was sold by the company when their packing-cases were broken up, and that there has been no actual obstruction sufficient to cause any inconvenience to the plaintiffs in the conduct of their business.

Down to this point, therefore, I find that there was a way

used in fact, and used for several years, by the plaintiffs before and at the date of the conveyance. But then Lord Coleridge says that such use was wholly permissive. Cases such as the present necessarily arise where the defendant is the owner of the property which he has conveyed to the plaintiff in the action, and is also the owner of other property adjoining which he does not convey, over which the right in question is claimed. If the plaintiff has himself been owner in occupation of both properties, the point taken by Lord Coleridge cannot arise, but the question is one of the mere fact, was there a roadway which was in fact used for the convenience of the particular tenement? But in the case before me there is unity of title but not unity of possession, because the plaintiffs themselves were in possession as tenants of the adjoining tenement. The use of the road by them was not of right, because the lease did not give it to them. They must, therefore, have used the road either by licence or without licence. Unless I am prepared to say that in no case can a tenant obtain under the Conveyancing Act, 1881, a right of way unless he has enjoyed it as of right, I must hold in this case that the fact of licence makes no difference. In all these cases the right of way must be either licensed or unlicensed. If it is unlicensed it would be at least as cogent an argument to say, "True you went there, but it was precarious, because I could have sent a man to stop you or stopped you myself any day." If it is by licence, it is precarious of course in the sense that the licence, being ex hypothesi revocable, might be revoked at any time; but if there be degrees of precariousness, the latter is less precarious than the former. But, in my opinion, precariousness has nothing to do with this sort of case, where a privilege which is by its nature known to the law—namely, a right of way—has been in fact enjoyed. Lord Coleridge's argument was founded upon a misconception of a judgment of mine in *Burrows* v. *Lang* (1), where I was using the argument of precariousness to shew that the right which was desired to be enjoyed there was one which was unknown to the law—namely, to take water if and whenever the defendant

(1) [1901] 2 Ch. 502.

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chose to put water into a particular pond; such a right does not exist at law; but a right of way is well known to the law. The instance suggested by Lord Coleridge in his argument illustrates my meaning: he put the case of a man living in a house at his landlord's park gate, and having leave to use and using the drive as a means of access to church or town, and to use and using the gardens and park for his enjoyment, and asked, Would such a man on buying the house with the rights given by s. 6 of the Conveyancing Act acquire a right of way over the drive, and a right to use the gardens and park? My answer is "Yes" to the first, and "No" to the second question, because the first is a right the existence of which is known to the law, and the latter, being a mere jus spatiandi, is not so known. The real truth is that you do not consider the question of title to use, but the question of fact of user; you have to inquire whether the way has in fact been used, not under what title has it been used, although you must of course take into consideration all the circumstances of the case, as appears from the *Birmingham Banking Co.'s Case* (1) and *Godwin* v. *Schweppes, Limited.* (2)

Further, with regard to this question of the materiality of the licence, I have the decision in *Kay* v. *Oxley* (3) that the licence is immaterial. Blackburn J. says (4): "I do not think it necessary to consider whether or not that parol licence, which was given by the defendant, to use the road, was revocable; or whether an action might not have been maintained for obstructing the tenant in doing that which he had a parol licence to do; or whether an action of trespass could have been brought against the tenant for using that road. I do not think it material to decide that. The licence was not in fact revoked." He therefore, as I understand him, treats the only relevant question as being: Was the way in fact enjoyed at the date of the conveyance? If so, the fact that it was enjoyed under a licence which had not been revoked was immaterial. If it had been enjoyed without any licence at all for a number of years, although no prescriptive right had been

(1) 38 Ch. D. 295.
(2) [1902] 1 Ch. 926, 933.
(3) L. R. 10 Q. B. 360.
(4) Ibid. 368.

or could have been acquired, still it was in fact enjoyed. It is in each case a question of fact to be determined on the circumstances of the case whether it has, or has not, been enjoyed within the meaning of the statute.

That really disposes of the case, because the plaintiffs do not claim for horses and carts, or to use this road by night. Now I find as a fact that the gates have been unlocked from 6 A.M. to 10 P.M. on all week-days except Saturdays, and on Saturdays from 6 A.M. till 8 P.M. The way granted is that enjoyed, and I must find what the way enjoyed has been. The right of the plaintiffs is to use this roadway for the purposes of their business, and for the purposes of the person who resides there within the times I have mentioned, but not with carts drawn by horses or a horse.

There is one point I omitted to mention. The cases which have been referred to turn in a great measure on the fact that there was a made roadway leading to the plaintiff's premises. In this case there was a way made, although it was not paved on the plaintiffs' side until quite recently; and in my opinion, on the authority of *Roberts* v. *Karr* (1), the fact that the conveyance states that the property is bounded by a roadway constructed and leading to the yard estops the defendant from saying there is not in fact a roadway which necessarily passes the door in the plaintiffs' wall opening on to the yard.

Solicitors: *Ashurst, Morris, Crisp & Co.; G. & A. Marshall, for Shield & Mackarness, Petersfield.*

(1) 1 Taunt. 495; 10 R. R. 592.

J. R. B.

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Feb. 18, 21; *March* 24, 31.

In re TELESCRIPTOR SYNDICATE, LIMITED.

Company—Winding-up—Stay of Proceedings—Private Company—Undisclosed Agreement for Promoter participating in Vendor's Shares—Transfer of Vendor's Shares to Directors—Issuing Shares at a Discount—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 89—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 7—*Companies Winding-up Rules*, 1890, *r.* 58.

In the exercise of its jurisdiction with reference to staying proceedings under an order for the winding-up of a company, the Court should, so far as possible, act upon the principles which are applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual—in which cases the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large.

In refusing or postponing a stay of winding-up proceedings the Court will have regard to the following facts:—

(*a*) That directors have not complied with their statutory duties as to giving information to the official receiver or furnishing a statement as to the affairs of the company.

(*b*) That there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully paid shares forming the consideration for the purchase of property by the company on its formation.

(*c*) That the promoter has made gifts of fully paid shares to the directors.

(*d*) That there are any other matters connected with the promotion, formation, or failure of the company, or the conduct of its business or affairs, which appear to the Court to require investigation.

And, *semble*, the same principles are applicable whether the company has or has not invited the public to subscribe for its shares—at any rate, if any shares held by those originally connected with a company of the latter description have been transferred to persons not having full knowledge of what has been previously done.

THE company was incorporated on April 22, 1896, with a capital of 40,000*l.*, divided into 40,000 shares of 1*l.* each, with the object of entering into an agreement for the purchase of certain patents from one Bernhard Hoffmann for 35,000*l.*, payable in fully paid shares. The memorandum of association was signed by seven persons, each for one share, and two of those persons were Mr. Paul Hoffmann and Mr. Bernhard

Hoffmann. On the next day, April 23, 1896, the majority of the subscribers to the memorandum signed a document appointing as first directors Mr. Roger W. Wallace, Mr. B. Hoffmann, and Mr. Paul Hoffmann. On the same day a board meeting was held, at which Mr. Wallace and Mr. P. Hoffmann were the directors present. The agreement was read and approved, sealed, and exchanged. A letter signed by B. Hoffmann was read requesting the board to allot, out of his 35,000 shares, shares as follows: To Mr. R. W. Wallace 14,250, to other persons smaller numbers, and to B. Hoffmann himself 17,000. On April 29, 1896, the share certificates were ordered to be sealed (except those of Mr. Wallace's 14,250 shares), and, further, certificates for the memorandum shares. That left 14,250 shares, which Mr. Wallace was to have, and 4993 other shares. On November 4, 1896, applications for shares by Dr. Hopkinson, Mr. Hayes Fisher, Mr. Joseph Lawrence, and Mr. Wallace were received, and 4000 out of the 4993 shares were allotted to them as follows: 1000 to Dr. John Hopkinson, 1000 to Mr. Hayes Fisher, 1000 to Mr. Joseph Lawrence, and 1000 to Mr. Wallace. Mr. Fisher and Mr. Lawrence had been appointed directors on July 30, 1896. On August 5, 1897, applications were received from Mr. Wallace for 250 and from Mr. Lawrence for 250 shares, and these were allotted. On February 4, 1898, allotments were made as follows: To Mr. Wallace 124 shares, to Mr. Lawrence 123, to Mr. Hayes Fisher 123, and to Dr. Hopkinson 123; and these made up the 4993 shares. It was alleged that these 4993 shares were paid for in cash. On November 18, 1898, Mr. B. Hopkinson was appointed a director. At the date of the winding-up Mr. Wallace, Mr. Hayes Fisher, Sir Joseph Lawrence, Mr. B. Hopkinson, and Mr. Paul Hoffmann were directors. The 14,250 shares were dealt with thus. On November 18, 1896, the following transfers of shares from B. Hoffmann were presented to the Board and ordered to be passed—namely, 2000 to Dr. Hopkinson, 2000 to Mr. Lawrence, 2000 to Mr. Hayes Fisher, and 8250 to Mr. Wallace. The company's financial position grew worse, and there was no trading by selling patents or goods. On December 2, 1901, the

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bank balance was only 6*l.* 19*s.* 4*d.*, and the same amount was reported in February, 1902, and August, 1902. In September the petty cash account had been overdrawn by about 60*l.* By December, 1901, and thenceforward the company was very short of money. The petitioners for winding-up were the Westminster Trust, Limited, the lessors of the company's offices, and on February 20, 1902, the secretary reported having received an application by the solicitors for the trust for immediate payment of the rent then owing, and it was resolved that the secretary should endeavour to arrange for the acceptance by the trust of debentures as collateral security. The trust were then pressing for payment, and their claim was not met. On August 1, 1902, the secretary reported that a writ had been served by the Westminster Trust for rent (368*l.* 11*s.* 7*d.*), and it was resolved to let the matter take its course. Mr. R. W. Wallace, K.C., and Mr. P. Hoffmann were the directors present. Judgment was recovered, and on November 7, 1902, the Westminster Trust presented their petition, and on November 25, 1902, the winding-up order was made. On November 27 the official receiver gave the usual notice to the directors and Mr. C. Scott, the secretary, to attend on him on December 3 to give information as to the company's affairs. On November 28 the official receiver called on the same persons to submit a statement of affairs within fourteen days. On December 3, the day appointed, no one of the directors attended, and no one of the directors made, by writing or otherwise, any response whatever to the request made to them to attend. Mr. Scott, the secretary, did attend, and gave certain information as to the company, but stated that it was the intention of the directors to apply for a stay of the proceedings in relation to the winding-up. Nothing was done until December 9, when the official receiver wrote to Mr. Scott that if no stay was obtained he must proceed. On December 17 notice was sent to the directors and secretary to attend on December 19. To that letter no one of the directors sent any reply except as below stated.

Neither Mr. Wallace nor Mr. Hayes Fisher made any response at any time.

Mr. P. Hoffmann wrote on December 18.

Sir Joseph Lawrence wrote on December 23 and December 30, and apparently there was not any intention on his part not to attend the appointment he was summoned to attend, if he had understood that he was definitely required to attend.

In his letter of December 23 he said: "Both Mr. Hayes Fisher and myself were unaware that the rent was running on or any expenses being incurred. The business was really in the hands of Mr. Roger Wallace."

On December 19, the day appointed for the attendance, no director attended, but Mr. Scott came again.

On January 13, 1903, a third notice was sent to all to attend at an appointment fixed for January 16.

On January 15 notice was given by Mr. Scott, the secretary, and a creditor of the company of a motion for an order to stay the proceedings under the winding-up order.

He filed an affidavit to the effect that he had settled the claim of the petitioning creditors and the claims of all the other creditors.

In his affidavit the official receiver said: "I have no information as to the terms upon which the claim of the petitioning creditors has been settled, or as to the terms upon which the other creditors of the company have consented to the winding-up being stayed. It appears from an entry in the above-named company's minute-book, which was produced to me by the said Claude Scott, that some of the directors received large blocks of fully paid-up shares issued to them as nominees of the vendor to the company, and I am informed by the said Claude Scott that some of these shares were transferred by way of bonus to subscribers of the capital of the company. The said C. Scott informed me that he was unable to give any information as to the promotion and formation of the company, as he was not connected with the company at the time when it was formed, but was appointed secretary some months afterwards."

The company never issued any prospectus, and apparently "the only persons who became interested in the shares were

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those already mentioned, except (as appeared from an entry in the minute-book dated July 27, 1897) that a large number of transfers were passed to various other persons."

The motion to stay proceedings was heard on February 18, 1903.

J. G. Wood, for the applicant. By s. 89 of the Companies Act, 1862, the Court may at any time after a winding-up order, upon the application of any creditor or contributory, and upon proof to the satisfaction of the Court that all proceedings in such winding-up ought to be stayed, make an order staying the same. The present application is made under that section by the secretary of the company, who is also a creditor. The application is made with the assent of the other creditors and of the great majority of the shareholders.

R. J. Parker, for the official receiver. The directors have not complied with the statutory duties imposed on them by the Companies (Winding-up) Act, 1890, and the rules thereunder with reference to giving information to the official receiver and furnishing a statement of affairs. Under the circumstances it is for the Court, in its discretion, to decide whether the winding-up proceedings should be stayed, at any rate before the directors have performed their duties.

It is submitted that since the Act of 1890 the same considerations apply with reference to staying the winding-up of companies as apply in the case of applications to rescind receiving orders and annulling adjudications in bankruptcy against individual debtors. Some investigation should be made in each case as to what led to the bankruptcy of the individual or the failure of the company, and in the present case the order to stay ought not to be made until the directors have given full information to the official receiver.

In bankruptcy the exercise of the jurisdiction to rescind a receiving order is discretionary; the order will not be rescinded as a matter of course because all the creditors consent; and the Court will consider all the circumstances, the interests of the general body of creditors, and the interests of the public; and will also be guided by the statutory provisions as to the annul-

ment of an adjudication of bankruptcy: *Ex parte Hester.* (1) In that case Fry L.J. said: "It is an idle notion that the Court is bound by the consents of the creditors. The Court has far larger and more important duties to perform than merely to consider whether the creditors have consented to the rescinding of the order. We are bound in the exercise of our discretion in such a matter . . . . to take a wider view. We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country." (2)

The fact that the petitioning creditor consents is not by any means conclusive, and the Court will not rescind a receiving order without investigating all the circumstances, including the debtor's conduct: *In re Flatau.* (3) The jurisdiction to rescind is exercised with the greatest caution, and under only special circumstances shewing clearly that the rescission is for the benefit of creditors, and that the debtor has not been guilty of misconduct in connection with his insolvency: *In re Izod.* (4)

The three cases are all decisions of the Court of Appeal, and the principles laid down apply with equal force to the bankruptcy of individuals and the winding-up of companies. [He also referred to the Companies (Winding-up) Act, 1890, s. 7, and the Companies Winding-up Rules, 1890, r. 58.]

J. G. Wood, in reply. The present application is not made by the directors. There has been no illegal transfer of bonus shares. If a compulsory winding-up does not afford the best means of dealing with the assets, the proceedings ought to be stayed. The omission to attend on the official receiver and give information seems to have been due either to a misunderstanding or to the fact that an application to stay the winding-up proceedings was in view. The issued capital has been fully paid up, and there has been no intention to mislead any one.

The analogy of rescinding receiving orders has not hitherto been applied to staying winding-up proceedings. Winding-up is in many respects different from bankruptcy. In bankruptcy

(1) (1889) 22 Q. B. D. 632.
(2) Ibid 641.
(3) [1893] 2 Q. B. 219.
(4) [1898] 1 Q. B. 241.

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a man by obtaining his discharge or having his bankruptcy annulled is set free to trade again in his own name. A company when wound up is dissolved and ceases to exist, and there is nothing to prevent those connected with it from forming other companies.

Cur. adv. vult.

Feb. 21. BUCKLEY J. By s. 89 of the Companies Act, 1862, it is enacted that when a winding-up order has been made the Court may stay proceedings under it, "upon proof to the satisfaction of the Court that all proceedings in relation to such winding-up ought to be stayed." The application on which I have to give judgment is a motion—on behalf of Mr. Claude Scott, who, since July, 1897, has been the secretary of this company—for an order under that section.

Before stating the principles applicable to the case I must state some facts, and the facts which I am about to state are taken from the company's minute-book and from the affidavits which have been filed upon this motion. [His Lordship then stated the facts above narrated down to the passing of the transfers of shares on November 18, 1896, and continued:—]

Now it appears to me that the fact that those four directors received from the vendor that number of 14,250 shares among them is one which excites attention—I purposely use a neutral word. I think it is a matter that ought to be looked into. [His Lordship stated the rest of the facts, and continued:—]

Where application is made in bankruptcy to rescind a receiving order or to annul an adjudication, the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case. In *In re Hester* (1) some trenchant observations of Fry L.J. will be found on the idle notion that the Court is bound by the consents of the creditors. The Court has to exercise a discretion. It is bound to regard

(1) 22 Q. B. D. 641.

not merely the interests of the creditors. It has a duty with regard to the commercial morality of the country: see *In re Hester* (1); *In re Flatau* (2); *In re Taylor*. (3) I am here asked to exercise an analogous jurisdiction, and I may say that it is in my opinion desirable that so far as possible the Court should not assume a different attitude or act upon a different principle in the winding-up of a company and in the bankruptcy of an individual. I have here to say whether it is proved to my satisfaction that all proceedings in relation to this winding-up ought to be stayed. I decline to say that I am satisfied as to that by the mere fact that since the winding-up order was made the assent of all the creditors and of a large majority of shareholders has been obtained. How it was obtained I do not know. I know that on August 1, 1902, the secretary reported the writ served by the petitioners to recover the debt in respect of which judgment was obtained, and on which the winding-up order was made, and that the directors then resolved to let the matter take its course. After the matter had taken its course, and the result was a winding-up order, the petitioners and the other creditors have in some way been induced to consent to a stay of the proceedings. I am entitled and desire to know why.

The facts which I have stated as to the appointments which the official receiver made for the attendance of the directors and the bringing in of a proper statement of affairs under s. 7 of the Companies (Winding-up) Act, 1890, may all be capable of explanation. I do not wish to prejudge the case in any way. It is possible—I cannot think that it is probable—that the directors who were summoned were absent from the country and did not receive the notices calling upon them to do that which by statute they were bound to do, and the omission to do which was a misdemeanour and subject to a penalty. All this may be capable of explanation; but to my mind an explanation is necessary.

Again, as to the affairs of the company while it was in operation, the matter may be (I do not for a moment say that

(1) 22 Q. B. D. 632. (2) [1893] 2 Q. B. 219.
(3) [1901] 1 K. B. 744.

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it is not) altogether right; but it is possible that there may be an ugly side to the picture, and I am entitled to know whether the picture is one which is fair or whether it has that ugly side. It is possible (I am not suggesting that it is probable) that these gentlemen would not come in and would not submit the statement of affairs because there was something to conceal. In their own interests, if in no other interest, I think that that ought to be cleared up. Why did they allow the writ to go, and resolve that the matter should "take its course"? And, when it had taken its course, and the result was a winding-up order with the consequence that a statement of affairs ought to have been brought in, why did they stay away and not perform the duty which the Act casts upon them? I am entitled to know why.

It seems to me, therefore, that what I ought to do in this case is this. I do not for a moment say how the facts as regards this company may work out, but I decline to order a stay of these proceedings until it is proved to my satisfaction that the winding-up ought to be stayed. That will not be proved to my satisfaction until it is shewn to me that all the facts are as I hope they are—that the trading operations of this company have been fair and above-board. The course, therefore, which I propose to take is this. I direct this motion to stand over until next Tuesday four weeks. I say four weeks for this reason—s. 7, sub-s. 4, of the Companies (Winding-up) Act, 1890, allows fourteen days for the statement of affairs to be brought in. If these gentlemen like to bring in the statement of affairs sooner, I daresay they can do so; but they may have the fourteen days mentioned in the statute. After the statement has been brought in and properly verified, it will be the duty of the official receiver to report, amongst other things, whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof; and it will be his duty, if he sees occasion, to make the further report that is mentioned in s. 8 of the Act of 1890. The official receiver ought to have a proper time to do that. I do not know, but I assume that fourteen days further

will be sufficient time for him to do that. If it is not, of course I shall attend to any application for further time. When this matter comes before me again, I hope that the parties will have discharged themselves of the duty which I think gentlemen in their position ought to have known that they owed, and will have shewn what the conduct of the affairs of this company has been, and I trust that when I hear more about it I shall be able to make the order which is asked for. If, however, I am not satisfied, I shall not be able to do so.

A statement of affairs was afterwards put in, and the official receiver made his report. In this report the assets were stated to be estimated at about 12,000*l.*, consisting principally of the estimated value of the patents. The debts and liabilities, including those to directors, were stated to amount to 3547*l.* The report also stated that the syndicate was promoted by Mr. Roger W. Wallace, K.C., and was formed to acquire inventions of Mr. Bernhard Hoffmann; that by an agreement of March 18, 1896, Wallace agreed with B. Hoffmann to register a syndicate to acquire the patents with a capital of 40,000*l.*, and to find subscribers for 5000*l.* of the syndicate's shares, the purchase-money to be 35,000*l.* in fully paid shares of 1*l.* each, of which Wallace was to have 15,000 shares for his services in the formation, and that this agreement was not referred to in the memorandum of association; that Wallace, P. Hoffmann, and B. Hoffmann were the first directors, but that the last named only acted once after the adoption of the purchase agreement of April 23, 1896, mentioned above; and, after stating that this gave the vendor the right to nominate one director, and was referred to in the memorandum of association, the report stated that shortly afterwards 20,750 vendor's shares were allotted to the vendor and his nominees, and that these, apparently, included 750 of Wallace's 15,000; that in July, 1896, Dr. John Hopkinson, Mr. Hayes Fisher, M.P., and Sir Joseph Lawrence were elected directors, and that on November 4, 1896, each of these gentlemen took 1000 shares, for which they paid in cash. The report then stated how the 14,250 shares were allotted, and that directors attended before

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the official receiver after the last hearing, and gave him information as to the syndicate. The report also stated as follows: "Mr. Hayes Fisher and Sir Joseph Lawrence state that they had no knowledge of the agreement of March 18, 1896 .... that, being associated with Mr. Wallace in other companies, they were asked by him to join the board .... on the understanding that it was to be a small syndicate with a working capital of 5000*l.*; that the capital was to be found by the directors, and that there was to be no appeal to the public for subscriptions. They further state that they made it a condition that no shares were to be parted with. Mr. Hayes Fisher states that no suggestion was made to him that he should receive any part of the vendor's shares at the time he joined the board, and no inducement was held out to him or any suggestion made that he should profit in any way beyond the profits arising on the money he subscribed, and that the vendor's shares allotted to him were a gift from Mr. Wallace, it being understood that any money required to finance the syndicate would have to be found by the directors, and there was to be no public body of shareholders. He further states that he made no inquiry as to how Mr. Wallace became entitled to the shares, and that when he joined the board he had not the least idea that he (Wallace) was going to give him 2000 shares. Sir Joseph Lawrence states that he had no knowledge of Mr. Wallace's agreement with the vendor, and generally he concurs with Mr. Hayes Fisher, but with regard to the 2000 vendor's shares received by him he states that 'Dr. Hopkinson, Mr. Hayes Fisher, and I, when we found that the capital of the syndicate, which we had originally thought was going to be of small dimensions, was registered as 40,000*l.*, made some comment on it to Mr. Wallace, pointing out that the amount of interest and control in the company in return for our 1000*l.* cash (and our gratuitous labour) was smaller than we anticipated. To this Mr. Wallace replied that he would put the matter right and would transfer us a portion of his own interest, and the said 2000 shares were transferred to us, and in pursuance of such arrangement we received a certificate for 2000 shares each. At the time when I joined

the board no mention had been made of any such transfer being effected, nor was such transfer made as part of any arrangement under which I joined the board or took shares in the company.'" Then the report said: "Mr. Roger Wallace, however, states, 'I offered to each of these gentlemen (the directors) 2000 shares on joining the board, which they accepted,'" and said that this was borne out by a letter to Sir Joseph Lawrence of July 28, 1896, by the solicitors to the syndicate. [It was denied in Court, however, that this letter ever reached Sir Joseph Lawrence.] The report further stated that no prospectus had been issued to the public, the cash capital of 5000*l.* having been subscribed by the directors; that no shares had been dealt with except 3400 (part of a block of 8500 lodged by the vendor with a foreign bank to cover an advance), which were now held by twenty-three persons; that no directors' fees were paid; that the 5000*l.* was spent in developing the patents; that sums had been advanced by the directors without security for working capital; that the cause of failure was stated to be the want of sufficient capital. And the official receiver expressed the opinion that further inquiry was desirable into matters relating to the promotion and formation of the company and the conduct of its affairs.

On March 24, 1903, the application for a stay was renewed.

J. G. Wood, for the applicant. The assets of the company, especially the patents, can be disposed of to better advantage if there is no winding-up. No advantage can result from continuing the winding-up, unless possibly some case can be made against the directors.

Astbury, K.C., and *Cecil Owen*, for R. W. Wallace. Wallace has filed an affidavit explaining his position. His case is that it was arranged between himself and B. Hoffmann that, having regard to what they were each bringing into the syndicate in the way of patent property and capabilities of exploitation and scientific knowledge, the 35,000*l.*, in fully paid shares, should be divided, Wallace taking 15,000, and that it was understood that he would probably have to part with a considerable

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portion of these shares to friends, whom he might ask to join with capital, or for other purposes in connection with promoting the general interests of the enterprise. The liabilities of the company to outside people are only of a very small amount, and different considerations apply when a company like this is a merely private concern not going to the public, as was pointed out by Jessel M.R. in *In re British Seamless Paper Box Co.* (1) It was certainly thought that the vendor's shares might be distributed as was thought fit, and there has been no intention to do anything morally wrong or contravening the law of companies.

Buckmaster, K.C., and *Hon. Frank Russell*, for Sir Joseph Lawrence and Hayes Fisher. Whether the winding-up proceedings are stayed or not, our clients will take care that no outside creditor shall lose a penny of any debt incurred while they were directors. These directors offer no opposition if the Court thinks that any further steps in the liquidation should be taken. They do not admit any liability for the syndicate, and submit that they are under no moral or legal liability. The legal liability cannot be discussed now, for there are not before the Court the materials for such a discussion; but the receipt of these vendor's shares did not reflect in any way on their honour or integrity. They had no lot or part in the formation of the company; they were not parties to any bargain with the vendor or Wallace; they took pains to make it clear that they were only prepared to join on the footing that no shares were to be dealt with by any person, that there were to be no directors' fees, and that there was to be no prospectus or invitation to the public. They had no actual knowledge of what was on the minutes before they joined the company. The letter referred to by the official receiver was certainly never received by Mr. Hayes Fisher, and there is every reason to believe that Sir Joseph Lawrence never got it. Other letters confirm this view, and shew that money could only be obtained for the company by means of shares; and because the directors found money, Wallace agreed to give them some of his shares. It makes all the difference

(1) (1881) 17 Ch. D. 467.

in the world that the syndicate was a private affair and not a company inviting the public to take its shares. These gentlemen did not receive a penny of profit or part with a single share. They asked Wallace to put an end to the company; but he assured them that there were no outside liabilities. An affidavit by Sir Joseph Lawrence and a statement by Mr. Hayes Fisher state their explanation, and, although they may have been guilty of carelessness, they have not done anything reflecting on their honour and integrity. They are not here to-day to contest their legal position, but to defend their conduct.

H. Terrell, K.C., and *Percy Wheeler*, for P. Hoffmann. Mr. P. Hoffmann was nominated as a director by his father, and held 1000 fully paid shares as trustee for his father.

F. Cassel, for B. Hopkinson. Mr. Hopkinson only became a director after the death of his father, and joined the board in November, 1898.

R. J. Parker, for the official receiver.

Cur. adv. vult.

March 31. BUCKLEY J., after referring to the petition for winding-up, the order made thereon, the application to stay proceedings, and the judgment delivered on February 21, 1903, continued:—The directors, though summoned, had failed to attend before the official receiver, and had failed to submit a statement of affairs. I declined to entertain the application until they had done so. I need add nothing to what I said on the previous occasion with reference to this matter. They have now attended, and have given all such information as has been required from them. I have to consider, upon the facts as at present ascertained, whether an order to stay proceedings ought now to be made.

The directors at the commencement of the winding-up were Mr. Roger Wallace, Mr. Hayes Fisher, Sir Joseph Lawrence, Mr. Paul Hoffmann, and Mr. Bertram Hopkinson. Upon the present hearing they have all appeared before me by counsel. Wallace, Lawrence, and Hoffmann made affidavits immediately before the application was in the paper for hearing, which the

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official receiver had no opportunity of seeing, and to which of course he has not replied. These affidavits have been read, and, subject to such reservation as is necessary in the case of affidavits thus put in at the last moment, I give full effect to their contents. Mr. Fisher has made no affidavit; but I allowed his statement, as made to the official receiver, to be read by his counsel as shewing what he admits to be the facts. I have had the greatest desire that everything the directors have to say should be brought before me. The question I have to determine must turn upon legal considerations. But, in a matter which the directors feel may affect their integrity, I have been desirous of giving the greatest possible latitude. As regards the circumstances under which the Westminster Trust got first a judgment and then a winding-up order, some suggestion was made in argument that in thus proceeding to extremities they were acting contrary to some understanding made or intended to be made with them. Mr. Hayes Fisher was a director, not of this company only, but of the Westminster Trust also, and it was suggested that he had promised to see that the latter company should not press the former. I decline to assume that Mr. Fisher was prepared any the less to do his duty by the Westminster Trust because he was also a director of this company. It is only fair to say that I find no trace of any such understanding as suggested. On the contrary, I think that he knew that the Westminster Trust were pressing for their rent, and that he intended, like his co-directors, to "let the matter take its course." [His Lordship referred to the board meetings about this time, and to the state of the company's bank balance and cash account, and continued:—] The company was at the end of its finances. The company was in fact wound up, not by reason of any slip by the Westminster Trust in failing to give promised time, but for the commonplace reason that the company was unable to meet its engagements and was commercially insolvent. To consider whether the winding-up thus commenced ought now to be stayed, I must trace as briefly as possible the history of this company. In 1896 one Bernhard Hoffmann was the owner of certain patents. He came into communication with

Mr. Roger Wallace, with the result that on March 18, 1896, there was executed between these two persons an agreement which provided that Wallace should, by Messrs. Faithfull & Owen, solicitors, register this company with a nominal capital of 40,000*l.* in 1*l.* shares; that Wallace should subscribe or procure subscriptions for 5000 shares; that Hoffmann should sell the patent to the syndicate when formed; that "the price to be named in the contract for the purchase" (these are the exact words of the agreement) should be 35,000*l.* in fully paid shares, and that 20,000 only of these should be the property of Hoffmann, and 15,000 should be the property of Wallace. On the next day, March 19, 1896, Bernhard Hoffmann and Wallace signed a letter, addressed to C. M. Owen, solicitor, of the firm of Faithfull & Owen, agreeing to give him out of the 35,000 shares 1750*l.* in fully paid shares, of which 1000 were to come out of Hoffmann's shares and 750 out of Wallace's shares. This agreement of March 18, 1896, and this letter of March 19, constituted secret agreements, which, so far as I see, were never known to any one but the parties to them. As to secret agreements of this kind, I may recall the good wholesome English of *Twyne's Case* (1) used 300 years ago of a different subject-matter, but very applicable nevertheless, mutatis mutandis, to a promoter of to-day: "And therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also, let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud." Fisher and Lawrence say they never heard of this contract of March 18, and I believe them. Faithfull & Owen, in a letter dated July 31, 1896, addressed to Lawrence's secretary, state that beyond the articles of association the only other document is the contract for sale by B. Hoffmann for 35,000*l.* in shares (being an agreement of April 23, 1896, which I am next about to state). thus denying the existence of the agreement of March 18, That agreement of March 18 was, however, in fact attested by Mr. Owen himself. As to the intended purpose of these 15,000 shares, I take the following from Wallace's affidavit:

(1) (1601) 3 Rep. 80 b, 81 a.

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"It was understood that I should probably have to part with a considerable portion of the 15,000 shares to people whom I might ask to join with capital, or for other purposes in connection with promoting the general interests of the enterprise." In plain English, the 15,000 shares were shares created as nominally fully paid against no payment or consideration, and for the purpose of their being employed as bonus shares with exactly the same result as if the company's shares were issued at a discount, and they were used with the same result as if the directors other than Wallace had taken shares at 66 per cent. discount, and Wallace had taken shares at a discount of about 90 per cent. Wallace promoted the company, and on April 22, 1896, incorporated it. The first object in its memorandum of association was to seal the agreement which I am next about to state. That was an agreement dated April 23, 1896, by which Bernhard Hoffmann sold to the syndicate the patent for 35,000*l.* in shares. Neither in this agreement nor in any other of the documents is the agreement of March 18, 1896, mentioned in any way. The first directors of the company were Wallace, Bernhard Hoffmann, and Paul Hoffmann. On April 23, 1896, at a board meeting at which Wallace and Paul Hoffmann were present, the agreement of April 23, 1896, was sealed, and a letter was read by which Bernhard Hoffmann directed the allotment of the 35,000 fully paid-up shares payable to him as follows: To Wallace, 14,250*l.*; to Owen, 1750*l.*; to each of two other allottees, 1000*l.*; and to Bernhard Hoffmann himself, 17,000*l.*; and it was resolved that as soon as the agreement was registered an allotment should be made in accordance with the terms of that letter. That letter, read at the same board meeting, must have been written before the company sealed the agreement. Wallace, therefore, simultaneously bound the company to give 35,000*l.* in shares and took 15,000 of them for himself.

On April 29, 1896, at a board meeting when Wallace and Paul Hoffmann were present, 20,750 of the vendors' shares and seven shares to the subscribers of the memorandum were issued. This left of the vendors' shares only Wallace's 14,250, and of other shares unissued 4993. On July 30 Dr. John Hopkinson,

Mr. Hayes Fisher, and Mr. Joseph Lawrence were elected directors. On November 4 1000 shares each were allotted to Dr. Hopkinson, Fisher, Lawrence, and Wallace, and for these, so far as I know, they paid cash, although I notice that the register of members does not credit them with the payments. Subsequently, on August 5, 1897, Wallace and Lawrence each took 250 shares, and on February 4, 1898, Wallace took 124, and Lawrence, Fisher, and Dr. Hopkinson each took 123 shares. For these allotments of August, 1897, and February, 1898, the allottees, so far as I know, paid cash, although again I notice that in the register of members credit is not given for the cash as having been paid.

I have now traced all excepting Mr. Wallace's 14,250 shares, and have purposely reserved these for a separate statement. On November 18, 1896, under the resolution of a board meeting at which Wallace, Fisher, Lawrence, and P. Hoffmann were present, there were allotted (although in the minute it is called a transfer from Bernard Hoffmann) the following vendors' fully paid shares, namely: To Dr. Hopkinson, 2000; Lawrence, 2000; Fisher, 2000; Wallace, 8250. Thus the 15,000 bonus shares which Wallace obtained under the secret agreement of March 18, 1896, were distributed as follows, namely: Wallace, 8250; Owen (the solicitor), 750; Dr. Hopkinson, 2000; Lawrence, 2000; Fisher, 2000.

As to the circumstances under which the three directors, Dr. Hopkinson, Lawrence, and Fisher, obtained these bonus shares from Wallace, the facts are not at present sufficiently proved. In the press copy letter-book of Faithfull & Owen there are found, seemingly copied in the ordinary course, press copies of letters to Lawrence and Dr. Hopkinson dated July 28, 1896 (two days, that is, before Dr. Hopkinson, Fisher, and Lawrence were elected directors), the substance of which is that Wallace intends that the person to whom the letter is addressed should take a seat on the board and subscribe, say, 1000*l.*, and that, besides the shares to be received for that subscription, Wallace should arrange that the person so joining the board should receive an allotment of double the amount of his subscription in bonus shares. Lawrence does not, nor does

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his secretary, remember receiving that letter. Dr. Hopkinson is dead. The letter has not been traced to either the one or the other. There is no similar letter to Fisher, but there is a letter to him of October 23, 1896, written by Faithfull & Owen, with respect to a subsequent syndicate to work the foreign patents, which offers him without payment fully paid shares in that later syndicate, adding, "which is as near as possible the same proportion, in regard to the interests acquired, as you get in the English syndicate" (meaning this company) "after taking into account the bonus shares given you there and your own subscribed shares." Wallace states, "I offered to each of these gentlemen (the directors) 2000 shares on joining the board, which they accepted"; and in paragraph 17 of his affidavit he says: "From time to time I had seen Sir J. Lawrence, Mr. Hayes Fisher, and Dr. Hopkinson, and had told them of the nature of the arrangements with Mr. Bernhard Hoffmann, and had told them that if I was satisfied with the invention I should ask them to join the board, and that they should participate with me in the bonus shares which I was to receive. The arrangement I proposed to make was to give a bonus of 10,000 shares for the finding of the 5000*l.* capital pro ratâ, and to keep the balance to deal with as I thought fit." Then he adds that on July 28, 1896, he instructed Faithfull & Owen to write to Lawrence and Dr. Hopkinson the letter of that date to which I have already referred. In the statements which they have made both Fisher and Lawrence give their version of the circumstances under which these bonus shares were given by Wallace to them. They agree that they gave no cash consideration for them, and the substance of their explanation is that they had thought that the capital of the syndicate was to be of smaller dimensions than it was, and that, in order to give them their fair proportion of the profits in return for the 1000*l.* cash which they were going to pay, Wallace transferred a portion of his interest to them gratuitously; but they say the gift was not made to them on the occasion of, or with a view to, their joining the board. Upon the present materials the facts are not sufficiently ascertained as to whether the 2000 bonus shares in the present company were given to

these three directors in connection with their joining the board.

The members of the company did not remain confined to the persons hitherto named. On July 28, 1897, at a board meeting at which Wallace, Dr. Hopkinson, and P. Hoffmann were present, 3400 of the vendors' shares were transferred to twenty-three persons, who, according to the transfers, purchased them at par. The contributories therefore include persons who were no parties to and are not affected by any concurrence of interest which existed as between the persons whom I have hitherto named. Fisher and Lawrence state that when they joined the company they stipulated that no shares were to be sold, and that besides themselves and the inventor there were to be no shareholders; and that when they learned that these transfers had been registered they were very angry. Lawrence states that he did not know until quite recently that these transfers had taken place. I am sorry to say that I cannot accept his recollection as to this. On August 5, 1897, he was present at the board when the minutes of July 28, 1897, were read, confirmed, and signed. The signature to those minutes is his own. It is at the foot of the page on which all the transfers are set out at length. He must have known of the transfers at that time.

The cash capital which the company had was spent, I understand, by degrees in experiments upon the patents. No trade was ever carried on. The creditors are few. The total amount is 3457*l.*, of which by far the larger amount is due to the directors, who made advances to the company, and of which the balance, with the exception of two or three small debts, is made up of the Westminster Trust's claim for rent and the amount due to the engineer and secretary. Upon the statement of affairs (taking the patents to be worth an arbitrary figure of 10,000*l.*) there is a surplus, after paying creditors, but subject to costs of winding-up, of about 8500*l.*, and as regards contributories a deficiency of 31,480*l.* A principal asset is a sum of 5085*l.* 15*s.* 6*d.*, due from the International Telescriptor Syndicate, being the syndicate to work the foreign patents which I have before mentioned. That is a second company,

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constituted, in fact, of the same five persons as are the directors of this company. The debt is put down in the statement of affairs as worth 2000*l.*

Upon the present application the creditors are said all to assent to a stay of the winding-up, the Westminster Trust agreeing to accept 100*l.* in cash and 300 shares in any new company formed to take over the patents, and the other creditors agreeing to await the resale of the patents to a new company for payment of their claims. Of the contributories, the consent of some, but not of all, has been obtained.

In the above state of facts I have to consider whether, within the language of s. 89 of the Companies Act, 1862, proof has been given to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed. In my judgment, such proof has not been given. I ought not, upon the present materials, to express an opinion whether, upon the facts as they now stand, or as they may hereafter appear when the question of fact as to the circumstances under which the 2000 shares were given to each of the three directors has been cleared up, the corporation—that is to say, the liquidator in the winding-up—would be entitled to a legal remedy against them. Further, it is not for me at present to determine whether the liquidator could sustain a claim against Mr. Roger Wallace and Mr. Owen, or either of them, for secret profit made by the promoter and his solicitor in the promotion of the company, nor whether, if such a claim were sustained, the three directors who each received 2000, part of those shares, could also be rendered liable upon the footing that, even if they had (as at present appears) no knowledge of the secret agreement of March 18, they had, at any rate, upon the minute of April 23, 1896, knowledge of the fact that the letter of April 23, 1896, signed by the vendor must have been written and given before the agreement was sealed, and that that letter directed the allotment of 14,250 of the vendors' shares to Mr. Wallace, one of the two directors acting for the corporation in sealing the agreement. For the present purpose it is sufficient to say that proceedings in this winding-up ought not to be stayed until the official receiver has had the opportunity of determining whether any such case ought to be proceeded with.

So far as I see at present, the principal questions in the winding-up will arise in the adjustment of the rights of the contributories amongst themselves. There may be, and probably will be, enough for the creditors. As between the transferees of July 28, 1897, on the one hand, and all the other contributories on the other, the question must, I think, arise as to how the surplus assets remaining after payment of debts (if there be such a surplus as seems probable) ought to be distributed. There may, further, be rights in such adjustment as between all the contributories, on the one hand, and Mr. Roger Wallace, on the other. Further, there is the debt of 5085*l.* 15*s.* 6*d.* due from the International Telescriptor Syndicate, whose members are the directors of this company. I think the official receiver, and not the directors of this company, is the proper person to determine how that claim should be got in. Further, and principally, this company, loaded as it is with bonus shares and having a nominal capital which is, and has from the first been, largely fictitious, ought not I think to be allowed to resume business. And, at any rate, I think that the liquidation ought to proceed so as to settle the list of creditors and contributories, and to ascertain more fully the circumstances under which each of the three directors received the 2000 bonus shares. It is not, therefore, proved to my satisfaction that the winding-up ought to be stayed.

In that which next follows I address myself exclusively to the case of Mr. Hayes Fisher and Sir Joseph Lawrence. They, by their counsel, have, for reasons which command my entire sympathy, elected to argue this case, not upon the ground of legal liability, but as a matter affecting their personal integrity. They will secure, Mr. Buckmaster tells me, that no creditor of the company shall lose any part of his debt, whatever be the result of this application. I could have wished they had added that they would secure that every one of those claiming under the transfers of July, 1897, shall be paid the full nominal amount of his shares. They do not press for, and are not anxious for, a stay of the proceedings, but they invite the judgment of the Court upon the matter from the point of view of their personal integrity. This Court is not a

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Court of conscience, and the question of legal liability is not at present ripe for decision. In the absence, therefore, of the invitation held out to me by their counsel to express an opinion upon the case as affecting them in their personal character, and as apart from legal liability, I should have added nothing upon the case as regarded from that point of view. But upon that invitation I add that which follows.

I think that in accepting the gift from Wallace of the 2000 shares each of these gentlemen did an act which this Court cannot approve. When they took those shares they must either have supposed that Wallace had made payment for them, in which case they were accepting a gift from him, or have supposed that he got them without payment, in which case they were acting with him in issuing the company's shares in fact at 66 per cent. discount. It is obvious that after they accepted those shares they were placed in such a position that when they looked at the minute of April 23, 1896, if they ever did look at it, and saw how Wallace had obtained the shares of which they were thus going to take part, it was their interest not to investigate that which otherwise ought to have caught their attention. Apart from legal considerations, and according to ordinary canons of good taste, a man is not, in the absence of special circumstances, justified in offering another a present of money or money's worth. In the absence of near relationship, long acquaintance, or special circumstances one man cannot (at any rate as between men of equal social standing) offer to another without offence, nor the other accept without loss of self-respect, a present of money, or shares, or the like. This, no doubt, is a matter of self-respect and not of legal liability. But the question goes beyond a mere question of self-respect when the present is given and accepted under such circumstances as to create a conflict between interest and duty. This Court will not allow a person holding a fiduciary position to place himself in such a position. At the same time, I regret to say that transactions of this kind are so far from uncommon that many persons will condescend to them without the intent which is the matter relevant in a question of personal integrity. The giving and acceptance

of commissions and presents have grown to such an extent that legislation is now pending to deal with that which is admitted to be a great evil. In the foregoing I have purposely abstained from referring to the question of fact, at present undetermined, whether the shares were or not given as a present on joining the board. For the time being I assume that question in favour of the directors. Further, I think that even if these directors did really intend at the outset that this should be a private syndicate, yet after the transfers were passed on July 28, 1897, they were wanting in their duty in that they allowed matters to go on after outsiders had been admitted. To Sir Joseph Lawrence, at least, I must attribute actual knowledge that that had been the case; and as to Mr. Fisher, I must add that if he did not know it, it was because he neglected his duty. As a director he ought to have known it. As regards Sir Joseph Lawrence, I have seen with regret from his letter of December 23, 1902, that, although a director of this company, he considered himself as having "really no responsibility," and that he says (as if that were a justification) that he has not attended any meeting for some years. To Mr. Fisher and himself (he writes) it is a matter of extreme annoyance to have their names dragged into this affair, "with which we have really had no responsibility." This is a frame of mind to be strongly condemned. A man cannot accept office and then say he is not responsible for the duties of the office. An argument was suggested before me, but dropped, that because the directors received no fees it was not reasonable to suppose that they would be active. It is, I think, of the first importance that it should be understood that a director, whether paid or electing to serve without payment, owes duties which he cannot in honour and honesty and legal liability disregard. The syndicate continued to be confined to the original holders for a year only—namely, from 1896 to 1897. After that date it included for more than five years—namely, from 1897 to 1902—other persons as transferees. It was during those subsequent five years that the original holders increased their holdings by taking up further shares in August,

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1897, and February, 1898, and that the undertaking of the company was continued until it had fallen into insolvency.

But, on the other hand, I am glad to be able to add that, so far as I see at present, there is not (subject to the above) any ground for attributing to them a want of personal integrity. They made no profit or fees of any kind in cash out of the concern. They did in point of fact take, and so far as I know at present pay for, shares to a substantial amount, and they made advances to the syndicate, also to a substantial amount. The outcome of the whole matter is that they are heavy losers by the company. If no one else had ever been admitted to membership (which, unfortunately, is not the case), they would have been in a position to say that, if the bonus shares transaction was illegitimate, it affected, at any rate, only the creditors (for whom they would provide) and themselves. It has been urged that a substantial asset of the syndicate consists of patents which are said to be, and for aught I know may be, of value, and that they can be much better realized by the parties than by the official receiver. I am not much impressed with this argument; for, if the patents be of value, I see no reason why the official receiver should not sell them to as much advantage as the parties themselves. And, even if that were not so, this consideration is not one which should prevail against the other considerations which I have detailed.

But, without binding either myself or any other judge before whom this matter may come in its subsequent stages, I may say that, so far as I see at present, it might be possible for the parties to regain the control of the patents, if in the course of the liquidation the matter were resolved as follows: If, after the lists of creditors and contributories have been settled, the official receiver were in a position to report that all the debts of the company had been paid, and that to all the contributories who came in under the transfers of July, 1897, the other members were prepared to provide for the return of the full amount of the nominal capital represented by their shares, and were prepared, by proceedings for reduction of capital, to provide for the surrender and cancellation of all the bonus

shares and the writing down of the remaining shares to such a figure as that the capital would be reduced to—say, 8000*l.* (being something below the estimated surplus on the statement of affairs after attributing 10,000*l.* as the value of the patents), or to such less sum as the assets might justify, I should, as at present advised, be prepared to stay the proceedings in the winding-up. In saying the above I do so with the earnest desire to assist the parties to retrace their steps. But I repeat that whether such a course be possible or not must depend upon how the facts, so far as at present unascertained, may work out. As matters at present stand, I must refuse to order a stay.

I dismiss the application and order the applicant to pay the official receiver's costs. I make no order as to the costs of the other parties appearing.

Solicitors for applicant: *Faithfull & Owen.*

Solicitor for liquidator: *Solicitor to the Board of Trade.*

Solicitors for other parties: *Steavenson & Couldwell; Charles Russell & Co.; Waterhouse & Co.*

F. E.

JOYCE J.
1903
Jan. 22;
April 2.

In re ROBERTS.
PERCIVAL *v.* ROBERTS.

[1901 R. 1021.]

Will—Construction—Vesting—Gift, after Life Interest, to Children of Tenant for Life "or Legal Representatives"—Children dying before Period of Distribution.

Testator gave a share of his residuary estate to each of his two daughters for their respective lives, and after their deaths their respective shares "to be equally divided between their respective children or legal representatives":—

Held, that "representatives" meant the representatives of the tenants for life and not those of the children; that the addition to the gift to the children of the words "or legal representatives" did not operate as a divesting clause, but constituted an alternative gift to arise only in the event of there being no child that took a vested interest; and consequently that all children of the daughters who survived the testator, or were born after his death, took vested interests notwithstanding that they might not have survived their respective mothers.

BROWNE ROBERTS, by his will dated May 18, 1854, after appointing executors, directed that the whole of his real and personal estate should be realized, and after payment thereout of his debts the residue should be divided into twenty equal shares. After disposing of fourteen shares the will proceeded as follows: "To my daughters Anne Catherine Scotland and Margaret Amelia Main I severally leave and bequeath three shares each of the twenty shares of the whole of my estate to be secured to them for the term of their respective life free from the debts, control, or incumbrances of their husbands, and without the power of alienation or intermediate anticipation of the rents or dividends. After their deaths their respective three shares to be equally divided between their respective children or legal representatives."

The testator died in 1854.

M. A. Main died on October 25, 1901, having had four children, one of whom died an infant before the date of the testator's will. Another of her children, Francis Ingram Main,

survived the testator and attained twenty-one, but died intestate in her lifetime, having mortgaged his reversionary interest under the will, and the plaintiffs were the assignees of that mortgage. Her other two children also predeceased her.

This was a summons taken out by the plaintiffs to determine the question who was entitled to the three twentieth shares of the residuary estate of the testator bequeathed to M. A. Main and her children.

Younger, K.C., and *Paterson*, for the plaintiffs. "Legal representatives" should be referred to the word "children," the immediate antecedent. But if not, then we submit that the children of the tenant for life take even though they did not survive her, and we are entitled as assignees of F. I. Main: *Wing* v. *Wing* (1); *In re Bennett's Trust* (2); *Hallifax* v. *Wilson* (3); *Strother* v. *Dutton*. (4)

Hughes, K.C., and *J. G. Wood*, for the executors of the tenant for life. "Legal representatives" means the legal representatives of the tenant for life.

Dibdin, K.C., and *Wrangham*, for the next of kin of the tenant for life. The addition of the words "or legal representatives" operates as a substitutional gift over in the event of there being no child who survived the tenant for life: *Girdlestone* v. *Doe* (5); *Jacobs* v. *Jacobs* (6); *In re Porter's Trust* (7); *In re Miles*. (8)

P. M. Walters, for the trustee.

Cur. adv. vult.

April 2. JOYCE J. (after referring to the loose and inaccurate language of the will, and stating that the testator must have been his own draftsman). In the first place, it has been argued that the "legal representatives" spoken of are the legal representatives of the children of Margaret Amelia Main, the tenant for life, and not of the tenant for life herself. This,

(1) (1876) 24 W. R. 878.
(2) (1857) 3 K. & J. 280.
(3) (1809) 16 Ves. 168; 10 R. R. 146.
(4) (1857) 1 De G. & J. 675.
(5) (1828) 2 Sim. 225; 29 R. R. 87.
(6) (1853) 16 Beav. 557.
(7) (1857) 4 K. & J. 188.
(8) (1889) 61 L. T. 359.

JOYCE J. 1903 ROBERTS, *In re.* PERCIVAL *v.* ROBERTS.

however, is not in accordance with the grammatical construction of the words used. Besides, if there were no child, it would result in an intestacy. And if "legal representatives" here ought to be construed to mean "legal personal representatives," the insertion of the words "or legal representatives" would be unnecessary and useless, the legal representatives referred to being those of the children and not of the tenant for life. I cannot hold otherwise than that the "legal representatives" referred to in the will are the legal representatives of the deceased tenant for life.

If I am right in this, it is not necessary for me actually to decide what in this will is the true meaning of the term "legal representatives" in the connection in which it is used. For the several persons who would be entitled under the various possible significations of "legal representatives" used in relation to the deceased tenant for life have come to some arrangement among themselves, and do not require or desire any decision upon this point from me.

Now, the gift I have to consider is not expressed to be to the children then living, or surviving, or with any other qualification, but simply to the children, that is, generally. Primâ facie it is absolute, and not depending upon the contingency of surviving the previous tenant for life. The question is whether such gift is modified to any and what extent by the subsequent words "or legal representatives," meaning thereby the legal representatives of the tenant for life.

If real or personal estate be given to A. for life, and after his decease to the children of B., all the children in existence at the testator's death take vested interests, subject to being partially divested in favour of children subsequently coming into existence during the life of A. Thus the objects among whom such real or personal estate becomes ultimately distributable are the children who may be living at the period of distribution and the representatives of such as may have died before that period, having survived the testator. It is contended, however, that the effect of the addition of the words "or legal representatives," in the event which has happened of the tenant for life having had children, but leaving no child

her surviving, is to divest the shares in the first instance given to and vested in her children, and to give over such shares to the legal representatives—whatever may be the meaning of that expression—of their mother, the deceased tenant for life. In other words, it is said that the words "or legal representatives" operate as a gift over, substituting, in the event which has happened, the "legal representatives" of the mother for her children, who, having survived the testator, or being subsequently born, died in her lifetime. To my inquiry what, upon this view, would have been the result if at least one, but one only, of the children had survived their mother, I do not think that any satisfactory answer was given.

In *In re Sibley's Trusts* (1) is a discussion by Sir G. Jessel of the effect of a gift to A. or B., the point of which, for the purposes of this case, is that you cannot construe such a gift unless you know who A. and B. respectively are, and in what relation, if any, the person or persons comprised in or represented by B. stand to the person or persons comprised in or represented by A., so as to be able to supply what is the contingency to be understood as involved in the word "or." What I have to determine here is the effect of a gift to X. or Y. in remainder after a life estate, where X. represents a class. Generally, in fact almost always, the persons or class represented by Y., in such a case as I am supposing, stand in some relation to the person or class represented by X.; as, for instance, that of survivors, issue, descendants, heirs, or representatives—in which case it is obvious that the persons represented by Y. could not have come into existence if those represented by X. had never existed. A gift to A. or his issue is, primâ facie, substitutional. So in a gift to A. or his representatives, where A. must have died before his representatives can come into existence. But different considerations do or may apply where the gift is a gift in remainder in the alternative to the children or the legal representatives of A., an existing individual, who might or might not have children capable of taking. In the present case it might well have happened that the children of Margaret Amelia Main, who

(1) (1877) 5 Ch. D. 494.

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died in her lifetime, or some of them at least, had married and themselves left issue. Indeed, one of such children—Francis Ingram Main—was in his thirty-eighth year when he died. Ought such issue to be left unprovided for because their father failed to survive his mother, or, as James L.J. put it in *Ralph* v. *Carrick* (1), are the grandchildren to go to the workhouse, and the family property go to a stranger under the gift over?

In a case of ambiguity or doubt, that construction is to be favoured which will allow of the child who takes a vested interest making such provision as is usual for his own family; and for this I rely upon what is called the rule in *Howgrave* v. *Cartier* (2), as explained in *In re Hamlet* (3), especially in the judgment of Cotton L.J.

Moreover, where there is a clear gift in a will, it cannot afterwards be cut down except by something which, with reasonable certainty, indicates the intention of the testator to cut it down; and if a gift over is fairly capable of being construed in two ways, and one construction will be consistent with the maintenance of the vested interests which have been clearly given in the first instance, the Court will struggle to adopt that construction. So far has this been carried that in the case of a gift to A. for life and after his death to his children, with a gift over if A. dies without leaving children, the word "leaving" will be construed "having" or "having had," in order not to defeat the prior vested interests: Hawkins on Wills, p. 217, and *Treharne* v. *Layton* (4) in the Exchequer Chamber, and see in particular the judgment of Amphlett B. in that case. If, instead of the words "or legal representatives" here, the testator had expressly said, "and in case they" (the tenants for life) "leave no children," or "in case of death without leaving children to their legal representatives," this would not have been sufficient to divest or take away any share previously vested in a child, even though such child did not survive the tenant for life.

Under the circumstances, I have come to the conclusion that

(1) (1879) 11 Ch. D. 873, 883.
(2) (1814) 3 V. & B. 79, 85; 13 R. R. 142.
(3) (1888) 39 Ch. D. 426.
(4) (1875) L. R. 10 Q. B. 459.

the words "or legal representatives" in this will, the legal representatives referred to being those of the deceased tenant for life, and not of her children, have not the effect of a substitutional clause, but only make provision for the event, which might have occurred, of there being no child who took a vested interest. It is true that the testator's daughter Margaret Amelia Main at the date of the will had one or two living children; but they might have died afterwards in the lifetime of the testator without taking any vested or other interest under the will. His other daughter, Anne Catherine Scotland, had no living child at the date of the will, and, in fact, as I understand, never had any child. I hold that in the gift in question in this case the words "or legal representatives" do not operate as a divesting clause at all, but constitute an alternative gift to arise in the event of there being no child that took a vested interest, and in that event only. The consequence is that, in my opinion, all the children of the testator's daughter Margaret Amelia Main, who were living at the testator's death or afterwards born, took vested interests which would pass to their legal personal representatives. There is nothing expressed, and I see no reason to imply anything that would divest such interests.

Solicitors: *Burgess, Taylor & Tryon; G. S. & H. Brandon; Faithfull & Owen.*

G. A. S.

JOYCE J.
1903
April 2, 8.

In re WOOLLEY.
WORMALD *v.* WOOLLEY.

[1903 W. 31.]

Will—Construction—Gift after Life Estate to Children, to Grandchildren then living "or the Issue of such as may have died"—Original or Substitutional—Conjunctions "or" and "and"—Joint Tenancy or Tenancy in Common.

Testator gave his property to trustees upon trust after the death of the survivor of his children to divide the same between and among his "grandchildren then living equally per stirpes and not per capita, or the issue of such as may have died (such issue taking a parent's share only), so that my grandchildren (or their issue) may take their shares equally in loco parentis":—

Held, that the gift to the issue of the grandchildren was original and not substitutional, and that a great-grandchild of the testator who predeceased his own parent and the last surviving tenant for life took a vested interest:

Held, also, that upon the whole will the issue of the grandchildren took as tenants in common.

Martin v. *Holgate*, (1866) L. R. 1 H. L. 175, followed.

In re Merrick's Trusts, (1866) L. R. 1 Eq. 551, considered and explained.

STEPHEN WOOLLEY, by his will dated June 22, 1860, gave all his real and personal estate to Benjamin Woolley and Jabez Woolley, upon trust out of the income of his estate to pay to his widow during her widowhood, and to his daughter Kesia (the widow of Joseph Lupton) during her life, a weekly sum, and to pay the residue of the said income to his sons Edward, Benjamin, Jonathan, and John, and his daughter Elizabeth (the widow of James Tempest), in equal shares. And he further directed that on the death or re-marriage of his widow the weekly payment to his daughter Kesia should cease, and the whole of the income should be paid equally between and among his daughters Kesia and Elizabeth, and his sons Edward, Benjamin, Jonathan, and John; and on the death of the survivor of his said children he directed his trustees to divide the trust estate between and among his "grandchildren then living equally per stirpes and not per capita, or the issue of such as

may have died (such issue taking a parent's share only), so that my grandchildren (or their issue) may take their shares equally in loco parentis." And he empowered his trustees to apply the interest and produce of the share of the said principal moneys of any of his grandchildren (or their issue) in their support and education during their respective minorities.

The testator died on August 15, 1860, leaving surviving his widow (who died on November 2, 1872) and six children, namely:—

1. Edward Woolley, who died without issue on October 19, 1864.

2. Benjamin Woolley, who died without issue on October 22, 1861.

3. Kesia Lupton, who died July 16, 1877, leaving a child, the defendant Mrs. Sarah Carter.

4. Elizabeth Tempest, who died March 27, 1890, having had one child, Mary Jane Webster, who died November 2, 1901, having had three children, Frederick Charles Webster (who died without issue on December 17, 1900, having previously married the defendant Alice Lodge, who was his sole executrix and legatee), and the daughter Annie Webster and Arthur Ernest Webster.

5. Jonathan Woolley, who died September 2, 1889, having had four children, some of whom had died leaving issue.

6. John Woolley, who died February 25, 1902, leaving one child, Walter John Woolley.

This was an originating summons, taken out by the present trustees of the will, raising, inter alia, the following questions:—

1. Whether the testator's great-grandchild, F. C. Webster, who died before his mother, M. J. Webster, now deceased, and before the said John Woolley, took a vested interest in the testator's estate?

2. Whether the issue of the testator's grandchildren took as joint tenants or as tenants in common?

Baker, for the trustees.

Hughes, K.C., and *Underhill*, for Mrs. Lodge. F. C. Webster took a vested interest notwithstanding his death before his

JOYCE J. 1903 WOOLLEY, *In re.* WORMALD *v.* WOOLLEY.

mother and before John Woolley. There is nothing on the face of the will to suggest the necessity of the great-grandchildren of the testator surviving their own parents or the tenant for life in order to entitle them to take: *Martin* v. *Holgate* (1); *In re Smith's Trusts* (2); Theobald on Wills, 5th ed. 584.

[JOYCE J. referred to *King* v. *Cleaveland*. (3)]

Younger, K.C., and *Clauson*, for the defendants W. J. Woolley, A. Webster, A. E. Webster, and Mrs. Carter. The gift to the issue of the grandchildren is substitutional. "Or" is disjunctive here, and does not mean "and." The gift being substitutional, in order to take a vested interest F. C. Webster must have survived his mother: *In re Merrick's Trusts*. (4) The great-grandchildren take as joint tenants, there being no words of severance.

G. Cave, for the issue of Jonathan Woolley.

JOYCE J. (after referring to the will). With reference to the word "or" occurring in the foregoing disposition, it is not, I think, necessary to go so far as to say that it must be read "and." In a similar case, *King* v. *Cleaveland* (3), Turner L.J. said: "The word 'or' in this case, following, as it does, immediately upon the words 'then living,' seems to me to be the proper commencement of an independent gift. The testator having completed the gift to the children then living, it occurs to him that some of the children may have died, and he proceeds to provide for that event and does so by extending the gift to their legal personal representatives. This word 'or' seems to me to be put in opposition to the words 'then living,' and to have the same effect as if the testator had said, 'or in case any of them be then dead, to their legal personal representatives.'" The only gift to grandchildren in the present case being to those then living, and therefore wholly contingent until the death of the last survivor of the children, and no interest of any sort or kind being made to vest in any grandchild before the period when the distribution was to take place,

(1) L. R. 1 H. L. 175.
(2) (1878) 7 Ch. D. 665.
(3) (1859) 4 De G. & J. 477, 487.
(4) L. R. 1 Eq. 551.

the gift to great-grandchildren by virtue of the words "or the issue of such as may have died (such issue taking a parent's share only)" appears to me to be in no sense substitutional, but a distinct independent substantive, or, as it is sometimes called, an original gift. It is so when tried by the rule enunciated by Kindersley V.-C. in *Lanphier* v. *Buck* (1), in which his Honour says: "A gift to issue is substitutional when the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue: and a gift to issue is an original gift when the share which the issue are to take is not by a prior clause expressed to be given to the parent of such issue." The judgment of Turner L.J. in *King* v. *Cleaveland* (2) is to the same effect. Further, the decision in *Martin* v. *Holgate* (3) is to my mind an unquestionable and conclusive authority upon this part of the case, even if there might otherwise have been any room for doubt upon it. The question whether each great-grandchild must, in order to take, survive its own parent did not actually arise in that case, though there are to be found in the judgments some incidental observations bearing upon the point. The gift here in question is original and independent, and there is nothing expressed in this will, nor is there anything involved in the terms of the gift (which I have held not to be substitutional), even to suggest that a great-grandchild is precluded from taking unless or until it survive its parent. There is no artificial or other rule of construction, nor, as I think, any decision since *Martin* v. *Holgate* (3) that requires this. The decision of Lord Hatherley, when Vice-Chancellor, in *In re Merrick's Trusts* (4), not long before the hearing in the House of Lords of *Martin* v. *Holgate* (3), has been pressed upon me. Kindersley V.-C. had said in *Lanphier* v. *Buck* (5), as reported in 34 L. J. (Ch.) 650, 657: "I conceive that the true rule upon principle that ought to be applied is this, that if the gift be an original gift to issue, they need not survive the parent, but if it be a gift by substitution, then they must survive the parent in order to be

(1) (1865) 2 Dr. & Sm. 484, 494.
(2) 4 De G. & J. 477, 487.
(3) L. R. 1 H. L. 175.
(4) L. R. 1 Eq. 551.
(5) 2 Dr. & Sm. 498.

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substituted for the parent." Lord Hatherley quotes this with approval as very sound sense, and as a lucid interpretation of the principle upon which the Court ought to proceed. But he then held, as appears by the terms of the order made, that, in the case before him, the issue to take must survive their parents. The explanation is that, rightly or wrongly, he considered the gift there in question to be substitutional. He must, I suppose, have done this either because he thought that the gift to the children of a deceased child named in the will was in substitution for the share the parent would have taken, or because he considered that by a prior clause the share which the issue were to take was in the first instance expressed to be given to the parent of such issue. I am unable to reconcile the decision upon this point in *In re Merrick's Trusts* (1) with the later decision in *Martin* v. *Holgate* (2), which, of course, I must follow as that of a superior tribunal. I may add that the doubt which I expressed during the argument as to whether the whole of the marginal note in the report of *In re Merrick's Trusts* (1) be warranted by the judgment is fully confirmed by the observations of James L.J., when Vice-Chancellor, in *Hurry* v. *Hurry* (3), where he says: "I do not consider that the remarks of the Lord Chancellor in *In re Merrick's Trusts* (1) warrant the conclusion that every gift which is preceded by the word 'and' is an original and not a substitutional gift."

It was argued, however, that the gift to the issue of the grandchildren—that is, to great-grandchildren issue of each deceased grandchild—was a gift in joint tenancy. I do not think this is consistent with a fair reading of the will. As among the grandchildren there is a severance by the words "equally per stirpes and not per capita." The later words, "so that my grandchildren or their issue may take their shares equally in loco parentis" (being double or repeated words of severance), are superfluous as relating to grandchildren. I think they of themselves express that the issue, or rather each family of great-grandchildren, are to take their shares equally between

(1) L. R. 1 Eq. 551. (2) L. R. 1 H. L. 175.
(3) (1870) L. R. 10 Eq. 346, 348.

themselves just as much as the grandchildren. But in a case of ambiguity the Court very properly leans to the construction which creates a tenancy in common in preference to a joint tenancy. Not one ordinary person in twenty, I doubt whether one in a hundred, not being a lawyer, has the slightest idea that a devise or bequest to several nominatim, or to a class of persons without more, does not confer upon each a several and separate share which would pass to his representatives. So, as Lord Hatherley says in *Robertson* v. *Fraser* (1), "anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy." Here, moreover, that my reading of the words of the will in this respect must be the correct one is established by the terms of the subsequent clauses in reference to maintenance and separate use where the shares of great-grandchildren as well as of grandchildren are mentioned and referred to: *Gant* v. *Laurance* (2); and see also *L'Estrange* v. *L'Estrange*. (3)

The consequence is that, in my opinion, the great-grandchild Frederick Charles Webster, who lived to be married, but died before his mother, took a share which has passed to his representative.

Solicitors: *O. Edmonds, for Ford & Warren, Leeds; Thorowgood, Tabor & Hardcastle, for Bond, Barwick & Co., Leeds; M. L. B. Braund.*

(1) (1871) L. R. 6 Ch. 696, 699. (2) (1811) Wigh. 395; 12 R. R. 747.
(3) [1902] 1 I. R. 372, 467.

G. A. S.

SWINFEN EADY J.

1903

May 6, 7, 13, 14.

ROWELL *v.* SATCHELL.

[1902 R. 1140.]

Building Scheme—Restrictive Stipulations—Right to enforce—Notice.

Where an estate is sold in lots at successive sales under a building scheme imposing restrictive stipulations on the lots, a purchaser can only enforce the stipulations against property shewn as lotted in the plan and subject to the stipulations at the sale at which he purchases.

A purchaser can enforce the stipulations, although his conveyance contains an accidental or (*semble*) an intentional departure therefrom, as, notwithstanding the form of the conveyance, the purchaser is not entitled to the benefit of this departure as against other purchasers, nor are they bound by it.

Mackenzie v. *Childers*, (1889) 43 Ch. D. 265, and *Knight* v. *Simmonds*, [1896] 1 Ch. 653; 2 Ch. 294, applied.

Semble. A sub-purchaser of part of a lot can enforce the stipulations, although, previously to his purchase, his vendor had committed a breach on another part.

Where property is sold under an open contract, and no restrictions appear on the title, the mere fact that the vendor's solicitor proposes to insert restrictive stipulations in the conveyance, which are partly waived and partly insisted on, is not sufficient to affect the purchaser or his solicitor with notice that the property is already subject to restrictions.

WITNESS ACTION.

This was an action by Rowell, Kemp, Stevens, and Coles, the owners of certain plots on a building estate, to restrain Satchell and Whittle, the owners of certain other plots, from erecting or using buildings thereon except as private dwelling-houses, in breach of the stipulations of a building scheme.

The defendants denied notice of the stipulations, and submitted (inter alia) that the plaintiffs were not entitled to enforce them.

The facts relevant to these points were as follows:—

In 1887 Carew purchased a considerable estate known as the Eastbury estate at Northwood, Middlesex, and determined to lay it out as a building estate. Portions were offered for sale by auction from time to time, subject to stipulations which were substantially the same throughout; but the whole estate, though possibly laid out according to a building scheme and

plan kept in the office of the vendor's surveyors, was not shewn as so laid out on the plans at the earlier sales. In particular, the Hallowell Road portion, on which the defendants' property lay, was not shewn as laid out, nor any conditions or stipulations affecting it published, until the sale of June 26, 1889.

The conditions of sale all contained the following clause: "The sale of the respective lots is subject to the following stipulations intended for the benefit and protection of the property now offered for sale and the adjoining property of the vendor, and the present and future owners, lessees, and occupiers of such property." The stipulations provided (inter alia) that except on seven shop plots no building should be erected for or used as a shop on any lot, and only private dwelling-houses should be erected. The conditions also provided that each conveyance should contain proper covenants by the purchaser for giving effect to these stipulations, but that no purchaser should be entitled to any covenant from any other purchaser or from the vendor in relation thereto. The vendor did not reserve power to vary or waive the stipulations.

Coles' predecessor in title bought a shop plot at the sale of September 12, 1888, at which time the Hallowell Road property was not shewn as laid out on the plan, and no conditions or stipulations affecting it were published.

Stevens' predecessor, Longman, bought a private house plot by private contract, subject to the stipulations of the sale of June 26, 1889; and on March 25, 1901, he conveyed a portion thereof to Stevens. It was alleged that for about four years prior to the conveyance to Stevens, Longman had been using the portion retained by him as a building yard, and had erected builders' workshops thereon, and had thereby disentitled himself and his sub-purchaser to enforce the stipulations.

Kemp's predecessors in title bought private house plots at the sales of June 26, 1889, and April 30, 1890. Their conveyances were prepared by the vendor's solicitors on a lithographed form, adaptable for either private house plots or shop plots, and by inadvertence the words authorizing shops were not struck out. Kemp and his predecessors had, however, always treated the plots as private house plots.

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Rowell bought a private house plot at the sale of June 17, 1891. Lots 76 and 77 Hallowell Road were not shewn as lotted on the plan at that sale, though they had been so shewn on the plans used at the sales under which Kemp's and Stevens' predecessors bought. They merely appeared as blank spaces with the general building line running through them. Except in Kemp's case, the plaintiffs' conveyances all contained covenants in accordance with the stipulations.

The defendants were the owners of lots 74, 75, 76, and 77, Hallowell Road, which were offered for sale on June 26, 1889, and April 30, 1890, as private house plots.

Lots 74 and 75 were bought at the latter sale by Whittle's predecessors in title, but words authorizing shops were inadvertently retained in the conveyance of lot 74, which was not actually conveyed until February 12, 1895. Lots 76 and 77 were not sold at this sale, and owing to some oversight they were subsequently overlooked, and were not shewn as lotted on the sale plans of June 17, 1891, or July 28, 1891, on which they merely appeared as blank spaces with the general building line running through them. On May 11, 1900, they were conveyed by Carew to Whittle as one piece of land, and without the mention of any restrictions. The evidence, however, shewed that Whittle was fully aware of the building scheme before he purchased any of the above four lots.

In March, 1902, the defendant Satchell, on inquiring for shop plots in the neighbourhood, was informed that Whittle had some for sale. Whittle corroborated this statement, and verbally agreed to sell him a piece of land forming part of lot 77 for the erection of shops, assuring him that the ground was free of restrictions. Satchell was anxious to get a shop plot, as he knew that shops were not allowed on every part of the estate. He instructed Whittle's solicitor to prepare the conveyance, with a note that the ground had been sold as shop plots. Neither the abstract of Carew's title nor the conveyance to Whittle contained any reference to any restrictions; but the solicitor, who knew of the building scheme aliunde, proposed to insert certain stipulations, not precluding the erection of shops, in the conveyance. Some of these he insisted on; some

he waived at Satchell's request. During the negotiations on these points, Satchell saw the sale plan of July 28, 1891, but without any particulars or conditions of sale attached. Lots 76 and 77 were not lotted on the plan, but were shewn as blank spaces with the general building line running through them. The seven shop plots were marked, "Sold. Shop plots." Satchell sent a tracing of the two lots to the solicitor, and inquired whether he was bound by the building line on this plan. The solicitor replied that no building line was imposed by the deeds in this case.

The above facts were relied on as affecting Satchell with constructive notice of the building scheme, of which he had no personal knowledge. His conveyance dated April 25, 1902, authorized the erection of dwelling-houses with shops for ordinary trade purposes.

The defendants had built shops on their respective properties. The shops had the usual living rooms, and could be used as private dwelling-houses without any structural alteration.

The plaintiffs did not ask for a mandatory injunction.

Eve, K.C., and *Beddall*, for the plaintiffs. The vendor reserved no power to vary or release the stipulations of the building scheme, which was for the common benefit of all the purchasers, and can be enforced against a purchaser with notice, whatever be the form of the conveyance. The evidence shews that Whittle knew of the scheme; and Satchell is affected with notice, as the scheme would have come to his knowledge or the knowledge of his solicitor as such if reasonable inquiries had been made: Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3, sub-s. 1.

Hon. E. C. Macnaghten, K.C., and *Mark Romer*, for the defendants. The plaintiffs are not entitled to enforce the stipulations. This is clearly so as to Coles, as his predecessor in title bought before the Hallowell Road property was laid out on any sale plan, and could not have fettered the vendor in developing that property: *Renals* v. *Cowlishaw* (1); *Martin* v. *Spicer*. (2)

(1) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.

(2) (1886) 34 Ch. D. 1; (1888) 14 App. Cas. 12.

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Stevens is barred by the breaches of covenant of his vendor, Longman. Longman could not have enforced the stipulations himself, and a purchaser from him can be in no better position.

In Kemp's conveyances the scheme has been departed from by authorizing shops on private house plots. This variation, even if accidental, prevents Kemp enforcing the stipulations. Rowell cannot enforce the stipulations against lots 76 and 77, as they were not lotted on the sale plan at his purchase. Again, he cannot enforce the stipulation in respect of shops against lot 74, as it was sold prior to his purchase, and shops are expressly authorized by the conveyance.

With regard to the defendants, it must now be admitted that Whittle knew of the scheme. But Satchell knew nothing about it, and there was nothing to put him on inquiry. The only question is whether he got constructive notice through his solicitor. His solicitor no doubt knew of the scheme aliunde, but he could not have discovered it in this transaction. The title shewed no restrictions, and there was nothing to put him on inquiry: *Kettlewell* v. *Watson*. (1)

[SWINFEN EADY J. That is the crucial point. Suppose a purchaser employs an independent solicitor, and the vendor's solicitor inserts restrictive stipulations in the draft conveyance, neither authorized by the contract nor appearing on the title. Is the purchaser's solicitor put on inquiry?]

No. He would strike the stipulations out as wholly unjustified by the contract and title.

Eve, K.C., in reply. Under the circumstances I agree that Coles cannot enforce the stipulations in the present case; but Longman's alleged breach, even if established, is trivial and would not prevent him enforcing them: *Western* v. *Macdermott*. (2) In any case it cannot prevent Stevens enforcing them, as there has been no breach on the portion conveyed to him.

The words authorizing shops in Kemp's conveyances were retained per incuriam; but even if they had been purposely retained, they would not have affected the stipulations which

(1) (1882) 21 Ch. D. 685; (1884) 26 Ch. D. 501.

(2) (1866) L. R. 1 Eq. 499; 2 Ch. 72.

are paramount. Kemp has always treated the stipulations as binding, and is entitled to enforce them: *Knight* v. *Simmonds*. (1)

Although lots 76 and 77 were not lotted on Rowell's sale plan, the building line was carried through them, and there was nothing to indicate that they were not subject to the stipulations.

[SWINFEN EADY J. The stipulations refer to the lots, and do not apply to plots that are not lotted.]

In that case Rowell can only enforce them against lots 74 and 75, but Stevens and Kemp can enforce them against all four lots. Rowell can enforce the stipulation as to shops against lot 74, as the conveyance authorizing their erection was subsequent to his contract.

With regard to notice, I submit that Satchell was put on inquiry. He knew that shops were not allowed on every part of the estate, and he ought to have made sure that he was getting a shop plot or a free plot.

[SWINFEN EADY J. He was told that his ground was free of restrictions. When he objected to the proposed stipulations some were waived. Was he not justified in assuming that Whittle was imposing them for his own benefit?]

If that is so, I rely on constructive notice through his solicitor. An independent solicitor would at once have inquired where the stipulations came from.

[SWINFEN EADY J. Would he not have struck them out of the draft in the first instance without any inquiry?]

He had notice of the plan of July 28, 1891, which shewed a building line, and marked certain plots as "Sold. Shop plots."

[SWINFEN EADY J. Lots 76 and 77 were not lotted on that plan. Why should he assume that they were not shop plots, or that the vendor was not free to deal with them as he pleased?]

It would have been reasonable to inquire.

SWINFEN EADY J. stated the facts and continued:—It was intended throughout that the benefit and burden of the

(1) [1896] 1 Ch. 653; 2 Ch. 294.

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stipulations should belong to and be borne by the purchasers at the various sales. The scheme implies a mutual contract and covenant under which any purchaser can enforce the stipulations against any other purchaser, subject to this exception, namely, that a purchaser at any sale can only enforce the stipulations in respect of lots shewn as laid out up to that date, and as to which the restrictions are then defined, and that he cannot enforce them in respect of land retained by the vendor, as to which no lotting is shewn or stipulations published at the date of the sale at which he purchases.

I have first to deal with the objections to the plaintiffs' right to enforce the stipulations.

At the date of the purchase by Coles' predecessor in title the Hallowell Road property was not laid out, no conditions or stipulations affecting it were published, and it was open to the vendor to lot and deal with it as he pleased. Under these circumstances I am of opinion that Coles is not entitled as against the Hallowell Road property to enforce stipulations neither promulgated nor formulated at the date of his contract.

Stevens has acquired a portion of the property purchased by Longman, who is alleged to have previously committed a breach of the stipulations on another part of that property. It was contended that this breach disentitled the sub-purchaser to enforce them. But it has not been established that Longman committed any breach whatever, and, even if it had been established, the sub-purchaser of one portion of the property would not be precluded from enforcing the stipulations by reason of his predecessor's previous breach on another portion. Stevens is, therefore, entitled to enforce them.

Objections were made to Kemp's title to enforce the stipulations on the ground that the conveyances under which he holds depart therefrom by authorizing shops on private house plots. It was proved, however, that the words authorizing shops were retained in those and many other conveyances by the blunder of a conveyancing clerk, who, in drawing the conveyances on a lithographed form adaptable for private house plots or shop plots, omitted to strike out the words authorizing shops. But

even if those words had been intentionally retained, they would not have disentitled Kemp to enforce the stipulations. When once the vendor had offered the property for sale according to the stipulations, and had sold portions of it at the sale, he was not at liberty to grant conveyances to some of the purchasers departing therefrom.

In *Mackenzie* v. *Childers* (1) a building estate was offered for sale by auction in plots according to a plan and particulars and conditions of sale referring to a deed of mutual covenants to be executed by the vendors and purchasers. The deed which was executed by the vendors and the purchasers at this sale contained a recital that it was intended to be a part of all future contracts for sale of the plots that the purchasers should execute the deed and be bound by the stipulations. It was held that this recital was not a mere expression of intention which the vendors or their successors in title were at liberty to change, on future sales, and that, even if the deed had not the effect of a covenant by the vendors, they and their successors in title were precluded by a contract implied from the whole transaction from authorizing subsequent purchasers to depart from the provisions of the building scheme, and that the previous purchasers were entitled to an injunction to restrain the vendors' successors in title from so doing.

In *Knight* v. *Simmonds* (2) it was objected that the plaintiff Knight was not entitled to enforce the stipulations of a building scheme, because the conveyance to his predecessor was not strictly in accordance with those stipulations. Romer J. held that, notwithstanding the departure in the conveyance, the plaintiff's lots remained liable in every way to the scheme and the stipulations, and that the objection to his title to enforce them was not well founded. His decision was affirmed by the Court of Appeal. In my opinion the plaintiff Kemp is entitled to enforce the stipulations, notwithstanding the objection that has been raised.

It was objected that Rowell could not enforce the stipulations against lots 76 and 77, as those lots were not shewn as lotted on the plan or subject to any restrictions as regards user at the

(1) 43 Ch. D. 265. (2) [1896] 1 Ch. 653; 2 Ch. 294.

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sale at which he purchased. This objection is well founded, but the plaintiffs Stevens and Kemp are entitled to enforce the stipulations against those two lots.

It was conceded that Rowell was entitled as a matter of law to enforce the stipulations generally against lots 74 and 75, which had been previously sold; but it was urged that he could not enforce the particular stipulation against shops in the case of lot 74, as the conveyance contained words authorizing shops, so that as a subsequent purchaser he could not complain of the user. That objection is not well founded, as Rowell's contract was earlier in date than the conveyance of lot 74, so that no grant of that lot could be made to his prejudice.

I have now to consider the defendants' title. Having regard to the admitted facts, it is not disputed that Whittle had notice of the stipulations. With regard to Satchell, the matter is different. His case is that he wished to put up shops, and asked for shop plots. Whittle assured him that he had shop plots for sale, and he bought his land for the purpose of erecting shops, which he has erected. The question is whether he had notice of the stipulations. Now with regard to lots 76 and 77, part of which he bought, there is a circumstance which, so far as the facts have been proved, does not apply to any other part of the estate. By some slip or error which has not been explained, lots 76 and 77 remained unsold for a considerable time. They appear to have been lost sight of, and the vendor was apparently unaware that they had not been sold. They were ultimately conveyed to Whittle without the mention of any restrictions. Whittle had abundant notice that they were already subject to restrictions, but those restrictions do not appear on his title.

Now it is true that Satchell instructed Whittle's solicitor to prepare the conveyance; but I am of opinion that if an independent solicitor had been instructed he would not have acquired knowledge or notice of the stipulations. Neither the abstract of Carew's title nor the conveyance from Carew to Whittle shewed any restrictions, and so far there was nothing to put a purchaser on inquiry. Then there was this fact. Whittle's solicitor

proposed to introduce certain restrictive stipulations in the conveyance, some of which he insisted on, and some of which he waived at Satchell's request. The inference I draw from this is not adverse to Satchell, but in his favour. In my opinion, if an independent solicitor had been instructed, it may well be that he would have objected to the insertion of any stipulations in the conveyance; but, in addition to that, the inference to be drawn from the fact that the proposed stipulations were partly insisted on and partly waived at Satchell's request would be that it was Whittle who was imposing them for the first time, and for his own benefit.

I am of opinion that the building stipulations to which the land was already subject were not within Satchell's knowledge, and would not have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him, and that they did not come to the knowledge of his solicitor as such, nor would they have come to the knowledge of his solicitor as such if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor; and that, therefore, having regard to the provisions of the Conveyancing Act, 1882, s. 3, sub-s. 1, Satchell is not affected by notice of the stipulations. In my opinion he was acting with perfect honesty throughout. I do not believe in point of fact that he had any knowledge or notice whatever of the stipulations. I believe that he was acting in perfect good faith, and really thought he was acquiring shop plots absolutely free from any restrictions as regards the buildings he intended to put up, and as against him the action must be dismissed with costs.

[His Lordship then dealt with certain other points of the case, and held that the plaintiffs other than Coles were entitled to an injunction against Whittle.]

Solicitors: *Charles Rogers, Sons & Russell; Francis T. Jones.*

G. R. A.

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May 15.

RICHARDSON *v.* LE MAITRE.

[1903 R. 546.]

Practice—Agreement to refer to Arbitration—Legal Proceedings—Application for Stay—Step in Proceedings—Summons for Directions—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—*Rules of Supreme Court*, 1883, *Order xxx.*, *r.* 4.

Attendance by a defendant before the master on a summons for directions, taken out by the plaintiff, and acquiescence, without protest, in a common form order for delivery of pleadings, is taking a step in the proceedings within the meaning of s. 4 of the Arbitration Act (52 & 53 Vict. c. 49), and the defendant is thereby precluded from moving to stay proceedings under that section.

County Theatres and Hotels, Limited v. *Knowles*, [1902] 1 K. B. 480, must be taken to lay down a general rule.

THE plaintiff and defendant entered into partnership by a deed dated October 23, 1899, which contained a provision that any dispute, difference, or question arising between the partners touching the partnership should be referred to arbitration. There was also a provision that the plaintiff should take two-thirds of the profits and the defendant one-third, but that, if the defendant's share of profits should be less than 300*l.* in any year, the deficiency should be paid to him by the defendant. The plaintiff was out of health at the commencement of the partnership, and the business was practically managed by the defendant alone. The plaintiff alleged that the defendant had misappropriated partnership moneys, and persistently refused to give him any account.

On February 25, 1901, the plaintiff gave notice to the defendant that he desired the disputes between them to be referred to arbitration and had appointed an arbitrator. The defendant then appointed an arbitrator, and an umpire was appointed; but no award was made. The time for making an award expired on September 1, 1902, and was not extended. On March 6, 1902, the defendant gave the plaintiff notice, under a power in the partnership deed, to determine the partnership

on April 6, 1902, and the partnership was duly dissolved on that day.

On March 27, 1903, the plaintiff issued his writ in this action, claiming an account of the partnership dealings and a receiver. On April 7, 1903, the plaintiff took out the usual summons for directions, and on the return of this summons on April 15 the master, in the presence of the solicitors of both parties, indorsed on the summons the following order: "Usual order for pleadings. Trial by judge. Middlesex. Statement of claim fourteen days. Defence fourteen days thereafter."

The defendant's solicitor made no objection to this order.

On April 21, 1903, the plaintiff gave notice of motion for a receiver, and on April 28 the defendant gave notice of a motion to stay proceedings in the action pursuant to s. 4 of the Arbitration Act, 1889.

It appeared that the defendant had raised a contention that on the true construction of the partnership deed he was entitled to 300*l.* a year without being liable for losses.

Both motions now came on to be heard.

Wheeler, for the motion to stay proceedings. The defendant is clearly entitled to have the proceedings stayed unless he has taken a step in the proceedings. Taking a step must be something active; mere assent and acquiescence is not a step. In this case the order was the mere common form order, and would have been made in the same form if the defendant had not been there. The case of *County Theatres and Hotels, Limited* v. *Knowles* (1) is distinguishable, for there was a mutual order for discovery in that case—that is, an order which needed a special application by the plaintiff. In *Steven* v. *Buncle* (2) the defendant had actively intervened to press for pleadings.

Errington, for the plaintiff. The case is entirely covered by *County Theatres and Hotels, Limited* v. *Knowles*. (1) The judgment of the Master of the Rolls shews that the Court laid down a general rule not confined to the particular facts of that case. The partnership was dissolved two years ago, and an attempted arbitration proved abortive. The defendant is not

(1) [1902] 1 K. B. 480. (2) W. N. (1902) 44.

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entitled to a fresh arbitration now. Moreover, the defendant has raised a question at law. The plaintiff is entitled to a receiver.

Wheeler, in reply, admitted that if the proceedings were not stayed a receiver must be appointed.

SWINFEN EADY J. (after stating his opinion that under the special circumstances of the case the action ought to be allowed to go on). I am also against the defendant upon the point of law which has been raised under s. 4 of the Arbitration Act, 1889. That section provides that any party to legal proceedings may, "before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings." The question is whether the defendant brings himself within the requirements of that section. What has taken place? The defendant entered an appearance; the plaintiff took out the usual summons for directions. The defendant's solicitor attended the summons before the master. There is some dispute about what took place, but the account of the defendant's own solicitor is: "I attended, on behalf of the defendant, the summons for directions in this action before the master. The master simply gave the usual direction on the Chancery side upon such summons, viz., for delivery of pleadings, fixing the place of trial and the time for delivery of such pleadings. . . . On behalf of the defendant I did not press for delivery of pleadings, or any other matter arising on the summons for directions; knowing the practice to be as aforesaid, I simply left the master to deal with same." And the account of the defendant's solicitor, leaving out all he says about the point which is in dispute, is: "The master, with the assent of both parties, gave the usual directions for delivery of pleadings, and for the action to be tried in Middlesex."

It is contended that the defendant has taken no step in the proceedings; but in my opinion the case is covered by the decision of the Court of Appeal in *County Theatres and Hotels, Limited* v. *Knowles*. (1) There an order was made upon the summons for directions, for delivery of pleadings, and mutual discovery and fixing the place and mode of trial. It was contended for the defendant, as it has been contended here, that

(1) [1902] 1 K. B. 480.

as the order was not made on the initiation of the defendant, but only with his acquiescence, he could not be said to have taken any step. But the Master of the Rolls pointed out that Order xxx. has enabled the parties to obtain, on one summons, an order with respect to all interlocutory proceedings to be taken in an action, which they might before have obtained on several distinct summonses. He says (1): "The parties appear before the master with, as it were, a blank sheet on which he may make this inclusive order. When he does so, with the acquiescence of both parties, there is just as much a step in the proceedings by each of the parties as if an order had been made on his separate application. The defendant might have objected to the making of the order on the ground of the agreement to refer differences; but he did not do so, and is not in a position to ask for a stay under s. 4 of the Arbitration Act."

The only distinction counsel attempted to draw between that case and the present one was that an order was made for mutual discovery. Here an order was made that the defendant should have fourteen days for putting in his defence, thus giving him four days beyond the time fixed by Order xxi., r. 6. In my opinion, the details of the order made on a summons for directions do not make any difference. I should be frittering away the decision of the Court of Appeal if I held that it applied only to orders exactly similar to the one before them. Their decision is based on wider grounds. Attending this general summons for directions without objection, and without asking for an adjournment, in order to make an application to stay the action, is taking a step in the proceedings within the meaning of s. 4 of the Arbitration Act, 1889. The defendant's motion must be refused with costs.

[A receiver was then appointed.]

Solicitors: *Helder, Roberts & Co., for Simpson & Co., Leeds; Vincent & Vincent, for North & Sons, Leeds.*

(1) [1902] 1 K. B. 482.

J. R. B.

C. A.
1903
May 5.

In re HALL.
FOSTER *v.* METCALFE.

[1900 H. 3862.]

Executor—Administration—Contingent Legacy without Interest—Appropriation of Investment.

When a cash legacy is given upon the happening of a contingency, e.g., the attainment of twenty-one by the legatee, but without interest in the meantime, the executor is not entitled to set apart and invest the amount and appropriate the investment to satisfy the legacy, so that in case, on the happening of the contingency, the investment has become depreciated in value, the legatee must bear the loss.

An investment made under such circumstances remains part of the testator's estate, and the legatee is entitled on the happening of the contingency to receive the amount of the legacy in full in cash.

But if an executor sets aside and properly invests a reasonable amount to secure the legacy, he may then distribute the residue of the estate, and he will not be held personally responsible if, when the legacy becomes payable, the investment turns out to be not sufficient to answer it.

Decision of Kekewich J., W. N. (1902) 208, reversed.

Appeal from a decision of Kekewich J. (1)

The question was whether the executors of a testator were justified in appropriating a specific sum of railway stock in satisfaction of a contingent legacy.

William S. Hall by his will, dated November 26, 1896, appointed two executors, and (inter alia) he gave to each of his godchildren, namely, Phyllis Chalmers, Ellen Foster, Barbara Hall, and Harold Hall, who should survive him, "and who being a male shall attain the age of twenty-one, or being a female shall attain that age or marry under that age, the sum of 1000*l.* free of legacy duty, but without interest in the meantime."

The testator died on October 14, 1897. The four godchildren survived him.

Ellen Foster married and received her legacy.

On June 15, 1899, the executors invested the sum of 3000*l.* in the purchase of 686*l.* London and North Western Railway

(1) W. N. (1902) 208.

Consolidated Guaranteed 4 per cent. Stock, 700*l.* Great Eastern Railway Irredeemable 4 per cent. Stock, and 690*l.* Great Northern Railway Perpetual 4 per cent. Stock to meet the three legacies to the other three godchildren on their becoming respectively entitled thereto, and in the books of the trust the executors appropriated the 686*l.* London and North Western Railway stock to meet the legacy to Barbara Hall, the 700*l.* Great Eastern stock to meet the legacy to Phyllis Chalmers, and the 690*l.* Great Northern stock to meet the legacy to Harold Hall.

In November, 1900, an originating summons for the administration of the testator's estate was issued by one of the residuary legatees.

Upon this summons several orders were made.

Phyllis Chalmers attained twenty-one on May 29, 1902.

Shortly before she attained twenty-one a claim was made on her behalf that she would on attaining twenty-one be entitled to demand from the executors the sum of 1000*l.*, the amount of her legacy, and would not be bound to accept in satisfaction of it the sum of 700*l.* Great Eastern stock. That stock had become depreciated in value since the investment was made, and was worth only about 625*l.*

In March, 1902, the surviving executor issued a summons for directions as to the retention by him of the income arising from the investments appropriated to answer the legacies given by the testator to his three godchildren, in consequence of a claim being made that those godchildren were respectively entitled on attaining their majorities to the payment of 1000*l.* cash in lieu of the investments appropriated to them respectively by the executors.

Upon the hearing of this summons Kekewich J. made an order declaring that Phyllis Chalmers when she attained twenty-one became entitled only to 700*l.* Great Eastern stock, representing her contingent legacy of 1000*l.* (of which stock 670*l.* had been already transferred to her), and not to 1000*l.* cash. And similar directions were made as regarded Barbara Hall and Harold Hall respectively as to the investments appropriated to meet their respective legacies.

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Kekewich J. was of opinion that *Webber* v. *Webber* (1) only shewed that in such a case the legatee could not require the executor to make an appropriation, not that the executor had not the right to do so.

Phyllis Chalmers appealed.

Buckmaster, K.C., and *Baildon*, for the appellant. The question is whether in the case of a contingent legacy, the legatee not being entitled to interest on the legacy in the meantime until the happening of the contingency, the executors are at liberty, without the consent of the legatee, to appropriate an investment to satisfy the legacy, so that any loss which occurs, by reason of the value of the investment being deteriorated at the time when the contingency happens, must be borne by the legatee.

It is submitted that the legatee is entitled to be paid 1000*l.* in cash, or to have an investment of that value transferred to her. The general principle is thus stated in Roper on Legacies, 4th ed. vol. i. p. 931: "Where a legacy in sterling money is given on a contingent event, and not any interest payable in the meantime, there the legatee cannot have the legacy separated from the bulk of the testator's estate, and, strictly speaking, appropriated; because it cannot be ascertained what sum of stock will, at the time of payment, produce the exact amount of the legacy in sterling money; and in such cases it is the practice of the Court of Chancery to order the fund to be paid to the person entitled to the residue, he giving real security to the legatee for the payment, when the contingency happens." And the learned author refers to *Webber* v. *Webber* (1) as an authority for the proposition. In that case the residuary legatee was required to give security for the payment of a contingent legacy if the event should happen. It follows that, if the security were not given, the Court would not have parted with the fund. In the case of a vested legacy payable at a future time, there is a complete severance of the legacy from the residue. When there is a contingent legacy and interest in the meantime is not given to the legatee, the interest remains

(1) (1823) 1 S. & S. 311; 24 R. R. 180.

part of the residue, and the principal will fall into the residue if the contingency does not happen. But if the interest in the meantime is given to the legatee, or if there is a direction to accumulate the interest, there would be a severance from the residue.

The truth is that the legatee has a right to receive the sum of 1000*l.* cash when she attains twenty-one or marries before attaining that age, and the executor cannot satisfy her claim by handing over to her an investment worth less than 700*l.*

[VAUGHAN WILLIAMS L.J. What ought the executor to do?]

He should set aside and invest on a substantial security such a sum as under any circumstances which may be reasonably expected would be sufficient to satisfy the legacy. An appropriation would not be made for the benefit of the legatee, but for that of the executor. Both the capital and the income form part of the estate out of which the legacy is to be paid.

An analogous case is that of an annuity given by a will. In that case the executor is not entitled to set aside an investment which will exactly answer the annuity. He must set aside a sum which will provide for any contingencies which may reasonably be expected to happen: *Harbin* v. *Masterman.* (1)

[ROMER L.J. referred to Seton on Judgments, 6th ed. vol. ii. pp. 1679, 1690, and to *Allhusen* v. *Whittell.* (2)]

It is submitted that in such a case as this the executor had no power to appropriate an investment as against the legatee, and *Webber* v. *Webber* (3) is really an authority to that effect, and it has been so treated in the text-books.

Warrington, K.C., and *G. R. Northcote*, for the residuary legatees. In the Court below, s. 4, sub-s. 1, of the Land Transfer Act, 1897, was referred to as shewing that an appropriation could not be made except in the manner mentioned in that section. But the object of that section was to free land from liability. The general rules as to appropriation were not in the contemplation of the Legislature.

It is submitted that the fund when set apart and invested became the money of the legatee, though the income until she

(1) [1896] 1 Ch. 351. (2) (1867) L. R. 4 Eq. 295.
(3) 1 S. & S. 311; 24 R. R. 180.

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attained twenty-one fell into the residue. The trustees could have altered the investment without the consent of the residuary legatees. The contingent legatee must bear the loss by depreciation, and she would be entitled to the profit, if there were any. In some cases the Court has appropriated a fund to answer a legacy, and, if the Court would have done this, it is submitted that the executor would have been justified in doing so. The executor would then hold the fund in trust for the legatee on the happening of the contingency, but to pay the income to the residuary legatee in the meantime. The fund would be severed from the estate so far as the legatee is concerned. Appropriations thus made have been held valid in several cases: *Burgess* v. *Robinson* (1); *Sitwell* v. *Bernard* (2); *In re Waters* (3); Lewin on Trusts, 10th ed. pp. 687, 688; *Rock* v. *Hardman.* (4)

[ROMER L.J. In that case apparently the legacy was an immediate one, though payment was postponed by reason of the infancy of the legatee.]

If an appropriation could be made in such a case, it is difficult to see why it should not be made in the case of a contingent legacy. In *Green* v. *Pigot* (5) the Court directed an appropriation to secure a legacy to a female infant, to be paid at twenty-one or marriage; but, if she should die before, the legacy was to be considered as part of the residue of the testator's personal estate. If the Court would have made an appropriation, executors or trustees would be justified in doing so: *Hutcheson* v. *Hammond.* (6) In administering the estate the executor has a duty to perform towards both the pecuniary legatee and the residuary legatee, and it is submitted that here the executors performed that duty by taking 1000*l.* out of the estate and investing it upon a security which is authorized as a trust investment. It was the duty of the executors to make some use of the fund; they ought not to keep it lying idle.

Clauson, for the two infant godchildren.

Talbot Crossfield, for the executor.

(1) (1817) 3 Mer. 7, 9.
(2) (1801) 6 Ves. 520, 543; 5 R. R. 374.
(3) W. N. (1889) 39.
(4) (1819) 4 Madd. 253.
(5) (1781) 1 Bro. C. C. 103.
(6) (1790) 3 Bro. C. C. 128, 145.

VAUGHAN WILLIAMS L.J. In my opinion, the order of the learned judge cannot be supported. The question is whether the executors had any right to make such an appropriation as they have made without the consent of the legatee, and then to say that the loss arising from the depreciation of the stock which they purported to appropriate must be borne by her. In my opinion, it is not true to say that they could make such an appropriation and then throw upon the legatee the loss which has resulted. The question really, in each case, is this: When the investment which it is sought to appropriate was made, whose property was it? Did it become the property of the legatee, or did it remain a portion of the testator's estate? In my opinion, in the present case, in which the legacy was contingent and the legatee was, on the happening of the contingency, to take the legacy without interest in the meanwhile, the answer must be that this investment did not become the property of the legatee, but remained part of the testator's estate. In my judgment, there was no such appropriation as would compel the legatee to bear the loss or entitle her to take the profit arising upon the appropriation. The legacy was of such a character that as soon as the investment was made the interest thereon became a part of the estate of the testator, and, in the event of its not being wanted to satisfy legacies and the debts or other obligations of the testator, it would come to the residuary legatee by falling into the residue.

I think there has been some little confusion in the argument between a legacy payable in futuro and a contingent legacy. If there is a vested legacy which will certainly be payable in futuro, I take it the legatee has an absolute right to go to the trustee or executor and say, "Although my legacy is payable in futuro it is a vested legacy, and I require you to invest the amount of it"; and not only would the legatee have the right to require that, but he could insist upon its being done, and when it was done that would be an appropriation in the strict sense of the word, and the gain or loss upon the investment (as the case might be) would go to or fall upon the legatee. And that is what I understand Lord Hardwicke to have meant when he said in *Johnson* v. *Mills* (1): "I thought nothing was

(1) (1749) 1 Ves. Sen. 282.

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better settled, than what is now endeavoured to be made a question: that wherever a demand was made out of assets, certainly due but payable at a future time, the person entitled thereto might come against the executor, to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue these assets through several hands." That, however, has no application to a case in which not only is the legacy contingent, but the interest in the meantime, until the happening of the contingency, does not go to the legatee, but remains part of the testator's estate. In *Green* v. *Pigot* (1) Lord Thurlow treated the legacy as vested and defeasible if the legatee did not attain twenty-one or marry. But interest was given to her in the meantime, and there was accordingly no difficulty in the executor making an appropriation, because the legatee might at the time be treated as owner of the investment, she taking the interest in the meantime. In the present case, however, the contingent legatee does not take the interest in the meantime, and that interest is part of the testator's estate, and in these circumstances I have not heard any authority cited which leads to the conclusion that the executors had any right to do more than as prudent executors to retain as part of the estate a sufficient sum to answer the legacy, if it should become necessary to do so by reason of the happening of the contingency. The executors would have to deal reasonably with that part of the estate, and in fact would have to invest it as part of the estate generally and not as appropriated to any particular purpose. I need not say more. There is no authority for the proposition that the executors are entitled at their own will to take a part of the estate which they are holding to answer the contingent legacy and turn it into a trust fund, treating the contingent legatee as a cestui que trust. As to what might be done by an order of the Court or by arrangement I do not say, and I need not inquire. All I do say is that the executors under this will had no authority to make the appropriation which they did make, and that the loss by depreciation in value of the stock cannot fall upon the legatee. She is entitled to receive 1000*l.* in full without any deduction.

(1) 1 Bro. C. C. 103.

ROMER L.J. I am of the same opinion. If executors have to provide for a vested legacy and the person entitled to it cannot be found, so that there is no one competent to give a valid receipt for it, undoubtedly both the executors and the Court would have power to appropriate a sum of money to answer the legacy, and in a proper case to invest it for the benefit of the legatee. Further, if a legacy is settled upon trusts, the same considerations would apply. And, even if there is a contingent legacy, and by the will some of the income arising from the legacy is to go to the legatee before the contingency on which it becomes payable happens, then you may properly infer that the testator intended that a fund should be set apart and invested to answer the legacy. In such a case also I see no reason to doubt that the executor or the Court would have power to set apart and invest a sum of money to carry out the testator's wishes. Again, even if there be a purely contingent legacy and no provision is made as to the application of the interest in the meantime, that state of things will not paralyze the administration of the estate. It need not prevent the executor or the Court from distributing the residue after taking reasonable care to provide for the contingent legacy. I have no doubt that the Court in such a case would be entitled, after setting apart what it might consider a sufficient sum to answer the legacy, if it should become payable, to divide the residue amongst the residuary legatees. Nor do I doubt that in a similar case if an executor, without going to the Court, could prove that he had acted reasonably, that he had set apart an ample sum to answer the legacy and had invested it, and had then proceeded to distribute the residue, he would not be held personally liable to make good the loss if subsequently it should turn out that the sum so retained was not sufficient to answer the contingent legacy. That may well be so. But the fund so set apart would be set apart, not as the legacy, but to answer or secure the legacy, and the fund would still remain part of the estate, and the income ought properly to be paid as part of the residue. But, as it appears to me, even the Court has no authority, and certainly the executor unaided by the Court has no authority,

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which would justify treating the fund as a separate settled fund, to be invested and held on trust to pay the income to the residuary legatee, until it is ascertained whether the contingency happens or not, and subject to that for the contingent legatee with trusts over. The testator has not created any such trust, nor has the Court power to infer such a trust in a case in which there is no gift of the income to the legatee in the meantime. Neither the Court nor the executor has power to create such a trust. There is this dilemma, that if the fund is set apart as on a special trust there is no jurisdiction to do that; and, if it is not so set apart, how does the income go to the residuary legatee except on the footing that the fund still remains part of the general estate? In the present case the legacy was clearly contingent, and there is nothing in the will to give the income to the legatee before the legacy became payable, and to my mind the executors had clearly no power to set apart a fund, as they purported to do, and to invest it and hold it on a trust. The fund was not set apart solely to answer the contingent legacy, but was really held upon a trust. If it was not held upon a trust, but simply as an indemnity fund, then the appeal ought to succeed. The fund, being set apart without any consent of the legatee, must be held to be still part of the general estate. The executors had no power to turn themselves into trustees or to hold the fund to the prejudice of the legatee.

For these reasons I am of opinion that the appeal must succeed, and that the legatee, although she is entitled to claim the fund at its value, is entitled also to have the balance of the 1000*l.* made good to her out of the residuary estate.

COZENS-HARDY L.J. I am of the same opinion. I think the decision of the learned judge cannot be supported either on principle or on authority. It appears to me that until the legatee attained twenty-one the fund never ceased to be part of the estate to the income of which the residuary legatee was entitled. And, if the residue had been settled, the tenant for life would have been entitled to the income of the fund. That income is so taken because the fund has not become the

property either expectant or contingent of the legatee, but still remained part of the general estate of the testator.

When there is a contingent legacy of a sum of cash, and there is no direction, either express or implied, for the investment of it, I think the legatee cannot require a sum to be appropriated to answer the legacy. That was the view of Turner V.-C. in *King* v. *Malcott.* (1) He said: "A contingent legacy is separated from the assets, or secured, because it is a sum which in any event is certainly payable to some person, though it may be uncertain to whom it will become payable. But a contingent debt is a sum which it is altogether doubtful whether it will ever be taken out of the assets. Even in the case of a contingent legacy, the legatee is not, as it was assumed at the bar, entitled to have a sum actually retained or appropriated, to answer the legacy when the contingency arises. That is not an unusual way of providing for the legacy, but it is a matter of arrangement, not of right; and in strictness the legatee is only entitled to have security for the payment of the sum, should the contingency arise. The case of *Webber* v. *Webber* (2) illustrates the distinction."

If the legatee is not entitled to require the sum to be appropriated to answer the legacy, it would be strange if the executor, without the consent of the legatee, had a right to make an appropriation which might prove very detrimental to the legatee. In my opinion, therefore, the appeal must be allowed.

There must be a declaration that each of the three godchildren is entitled to receive 1000*l.* cash on attaining twenty-one, or if a female on marrying under that age. The appellant is entitled to interest at 4 per cent. on the balance due to her beyond the value of the stock ascertained at the time of her attaining twenty-one.

Solicitors: *Edgar Robins & Clark; Collyer-Bristow & Co., for Watson, Sons & Carrick, Hull; J. A. Bartrum.*

(1) (1852) 9 Hare, 692, 696. (2) 1 S. & S. 311; 24 R. R. 180.

W. L. C.

C. A.
1903
April 7, 8;
May 22.

NIGHTINGALE *v.* REYNOLDS.

[1901 N. 920.]

Mortgage—Portion—Priority — Mortgage by Direction of Court — Portions charged on Real Estate—Equitable Charge—Legal Mortgage.

A testator who died in 1851 charged three sums of 5000*l.* for children's portions on his real estate. In 1880 two of the portions had become raisable, and in an action brought for the purpose of clearing the estate from charges, an order was made in May, 1882, directing that the two portions should be raised by a mortgage of the estate to be settled by the judge to a person who was then willing to lend the money. The mortgage as settled contained recitals of the title to the portions and of the proceedings in the action, and was expressed to be without prejudice to any charge which might be subsisting in the mortgaged hereditaments under the will. The money was paid into court by the mortgagee, and was afterwards distributed among the persons interested in the two portions. The estate being now believed to be insufficient to pay the whole of the said portions, the mortgagee commenced the present action for the realization of his mortgage, and claimed priority over the persons interested in the remaining portion :—

Held, on the construction of the proceedings in the action, the judgment obtained, and the circumstances under which it was given, that no interference with the charge of the remaining portion was contemplated or authorized, and that there was nothing in the form of the mortgage settled by the judge which entitled the plaintiff to more than a charge on the estate for the two sums of 5000*l.*, pari passu with the third 5000*l.* charged thereon in equity by virtue of the will.

Decision of Kekewich J. affirmed.

Appeal from the decision of Kekewich J. (1)

As the facts are fully stated in the report of the decision of Kekewich J., and are again set out at length in the judgment of Romer L.J., the following short outline of the case will be sufficient to make this report intelligible.

Henry Muskett, who died in 1851, by his will charged his real estate with the payment of three portions of 5000*l.* for the benefit of his three daughters, Mrs. Etheridge, Mrs. Dashwood, and Mrs. Reynolds, and their respective families. In 1880 two of the portions, those of Mrs. Etheridge and Mrs. Dashwood, having become raisable, an action of *Muskett* v.

(1) [1902] 2 Ch. 117.

Muskett [1880 M. 01046] was commenced in the Chancery Division in order to get the testator's estate cleared of the charges thereon, and after a decree of July 3, 1880, directing numerous inquiries had been answered, an order of May 17, 1882, directed these two portions, with a sum for costs, to be raised by a mortgage of the testator's real estate to one Samuel Nightingale (the father of the plaintiff in this action), who was willing to lend the money, such mortgage to be settled by the judge. The mortgage made in pursuance of this order was dated July 21, 1883; it contained recitals of the title to the portions and of the proceedings in the action, and was expressed to be without prejudice to any charge which might be subsisting in the mortgaged hereditaments under the will. The money was paid by the mortgagee into court, and was distributed among the persons interested in the two portions. The estate being now considered insufficient to pay the whole of the three portions in full, the present action was commenced by the son and transferee of the original mortgagee against Mrs. Reynolds and her children, and other members of the Muskett family, and the National Reversionary Investment Company, who were assignees of the share of one of the children of Mrs. Reynolds, claiming priority over the persons interested in the remaining 5000*l.* portion.

Kekewich J. held that, notwithstanding his legal mortgage, the plaintiff was only entitled to a charge on the testator's estate for the two sums of 5000*l.*, pari passu with the third 5000*l.* charged thereon in equity by virtue of the will.

The plaintiff appealed.

As the case to a great extent turned on the construction of the proceedings and orders in the action of *Muskett* v. *Muskett*, the copy of the order made by Hall V.-C. of July 3, 1880, was examined with the record, when it was ascertained that inquiry 13 contained a reference to the three portions of 5000*l.*; so that it would appear that the third sum of 5000*l.* was by a clerical error omitted from the copy of the judgment which was supplied to Kekewich J., and the report in [1902] 2 Ch. at p. 119 requires correcting by the addition of a third sum of 5000*l.* in line 7 from the bottom of that page.

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P. O. Lawrence, K.C., and *J. K. Young*, for the appellant.

Warrington, K.C., and *Tyssen*, for Mrs. Reynolds and her children.

W. Peck, for the National Reversionary Investment Company. Similar arguments were addressed to the Court to those used in the Court below. The additional case of *Mosley* v. *Mosley* (1) was cited.

Cur. adv. vult.

May 22. ROMER L.J. The question we have to decide is to what extent the mortgage to Mr. Nightingale (hereafter called the mortgagee) has prejudiced or affected the charge created by the will of the testator Henry Muskett in favour of the annuities to Mr. and Mrs. Reynolds and of the portion of 5000*l.* for their children. For brevity I shall hereafter refer to these annuities as "the annuity," and to the portion as "the Reynolds portion." At the date when the action of *Muskett* v. *Muskett* was commenced, the annuity and the Reynolds portion were charged by the will on the testator's real and leasehold estate pari passu with the two other portions of 5000*l.* each. The annuity and the Reynolds' portion and one of the two other portions were secured by the covenant of the testator in his lifetime, and in respect of these there was a debt due from his estate at his death. The two last-mentioned portions (hereafter called the two portions) had become payable, but the Reynolds portion was not payable. The plaintiff in that action (hereafter referred to as the plaintiff) was, under the will, legal tenant for life, and the defendants were legal tenants in remainder of the estate, subject to the above-mentioned charges. In the will there was no provision enabling the tenant for life or any other person to free the estate or any part of it from the charges.

In this state of things, I think it is advisable, in order properly to determine this appeal, in the first place to consider carefully the proceedings in the action of *Muskett* v. *Muskett* (hereafter called the action) which resulted in Mr. Nightingale's mortgage, and then to discuss the terms of that

(1) (1800) 5 Ves. 248.

mortgage, on which the mortgagee's rights must ultimately depend.

Now it is clear from the statement of claim in the action that its sole object was to have the portions that were then due and payable raised and paid out of the settled estate, and to have the remaining portion raised and paid when it became payable. The only parties to the action were the persons legally entitled to the estate subject to the charges. There were no trusts to be administered. The statement of claim alleged (as the facts were) that the plaintiff (who was the sole legatee of the residuary personal estate under the will) had paid all the debts and legacies of the testator (other than portions), and had kept down the annuities bequeathed by the will. The statement of claim further alleged that those entitled to the two portions required payment. And the claim was only to have an inquiry what portions were then due and payable, and to have them raised by mortgage of the estate. The action, as constituted, in nowise appears to contemplate any interference with the charge of the Reynolds portion, or with the rights of those interested therein. Still less does it appear in any way concerned with, or to relate to, the annuity, and the persons entitled to that annuity were in no wise concerned in that capacity with the raising of the portions. In short, the action appears only to relate (so far as concerns the immediate action of the Court) to the enforcement of a right claimed on behalf of the tenant for life of the estate, subject to its charges as against those entitled in remainder, to have the two charges, that were then due and payable, raised out of the corpus of the estate belonging to the parties to the action—that is to say, the estate subject to its charges. But in such an action it was obviously right and proper, even if not actually necessary, especially as the plaintiff was the legatee of the testator's residuary personal estate, that it should be shewn to the Court that the testator's debts and pecuniary legacies and funeral and testamentary expenses were paid, and that the annuities charged against the estate were not in arrear. Accordingly, when the action came on for judgment in default of defence on July 3, 1880, there are inquiries and accounts directed to bring

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out the above facts. Also, as was right and proper, there was an inquiry whether any and which of the three portions were then raisable, and an account was directed of what was then due for interest and principal in respect of each of such of the portions as were then raisable. I need scarcely say that there is nothing in these inquiries and accounts to alter or enlarge the nature of the action, or to prejudice the annuity or the Reynolds portion. But there are parts of the judgment which confirm the view of the action that I have previously indicated. After the above-mentioned inquiries and accounts were directed, it is ordered that what (if anything) should be certified to be then due in respect of the said annuities, and also the future payments of the then subsisting annuities, should be paid and kept down by the plaintiff during his life out of the rents and profits of such parts of the estate as were subject to the said payments respectively. Then follows the significant provision for raising the taxed costs of the parties to the action. Now this last provision seems to me to shew clearly that the Court was only considering, for the purpose of raising the necessary moneys, the beneficial estate belonging to the parties to the action at the time of the judgment; for it not only includes, as part of the moneys to be raised, any necessary to discharge any unpaid debts of the testator, which as between the then parties to the action and those entitled to the charges on the estate would have to be borne by the former, but it also includes in the moneys to be raised the costs of the action. It is almost incredible that the Court should have contemplated that the plaintiff and defendants to the action should obtain payment of their costs by a charge to take precedence over the charge in favour of the annuity and of the Reynolds portion. With reference to the liberty to apply for a sale as well as for a mortgage, contained in the last-mentioned provision, it does not appear to me to militate against the view I am taking. A sale of part of the estate might have been made subject to the annuity, and if necessary also subject to the Reynolds portion. And even if for the purposes of raising the two portions already payable the Court might have had jurisdiction, as against the Reynolds portion, to order a sale of part of the estate, it would

never have done so without inquiry as to value in order to see that a part of the estate sufficient in value was left for the Reynolds portion; and no such inquiry was ever directed or (so far as I can see) ever really contemplated. And as against the annuity, I do not see what right the Court would have had in this action, and in the circumstances existing, to order a sale of any part of the estate freed from the annuity.

Looking, then, at the action as framed, and to the judgment obtained, having regard to its form and to the circumstances under which it was given, it appears to me that so far no interference with the charge of the annuity and of the Reynolds portion was contemplated or authorized.

Although it may not have been actually necessary that this judgment should be served on the members of the Reynolds family, it was obviously convenient and proper that that should be done, and that they should have an opportunity of appearing, and should be bound by the results of the proceedings. They were interested in several of the inquiries and accounts directed, and, moreover, through their trustees they were interested as ordinary creditors of the testator, and, should they have thought it right to insist on their rights as such creditors, difficulties might have ensued, and these difficulties would be removed by their being served and appearing and raising no claim. Accordingly they were served with the judgment and became bound by the proceedings; but it is clear that so far nothing had been done which had in any way prejudiced or affected their charges, or had indicated any suggested right or any intention on the part of the Court to prejudice or affect them.

Then followed the chief clerk's certificate. It answered the inquiries, and found (inter alia) that there were no outstanding ordinary debts of the testator, and no arrears of the annuity, and stated the position of affairs with regard to the portions, and set forth in the schedule the particulars of the estate, and found that there was no incumbrance affecting it other than the charges created by the will. Then came the order on further consideration of May 17, 1882. That order, on the face of it, appears to me also to bear out the view that the

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Court throughout the action was not contemplating or sanctioning anything to the prejudice of the charge for the annuity and the Reynolds portion. It made an order for taxation of the further costs of the plaintiff and defendants to the action and of the costs of the parties served with the judgment and having liberty to attend, and found that a sum of 185*l.* 19*s.* 10*d.* was needed for the enfranchisement of a copyhold portion of the estate required by the lord of the manor. It then stated that Mr. Nightingale was willing to advance the two sums of 5000*l.* and 5000*l.* required for the two portions raisable and the enfranchisement money and the taxed costs on a mortgage of the estate mentioned in the schedule to the chief clerk's certificate, or a competent part of the estate, and it was ordered that the said sums and costs be raised by mortgage accordingly, such mortgage to be settled by the judge. Then comes an important part of the order: "And it is ordered that the plaintiff be and he is hereby appointed to execute the same for the purpose of conveying the real estate so to be mortgaged for all the estate and interest of the infant defendants or other the persons entitled in remainder." That is to say, the order contemplates that the plaintiff would convey in respect of his own life interest, and in respect of those entitled in remainder, and not (so far as expressed) on behalf of any other persons. It is difficult to suppose from this that the Court contemplated any conveyance except by and on behalf of those entitled to the estate as settled by the will—that is to say, the estate subject to the charges. The order then gives leave to Mr. Nightingale to pay into court to the credit of the action the total of the said sums and costs, and then directs that thereupon the said mortgage should be executed by all proper parties, as the judge shall direct, and be delivered to the mortgagee. And then directs payment out of court of the costs and of the two portions raised and the enfranchisement money to the parties entitled to the same. It is to be noticed that Mr. Nightingale was made aware of the exact position of affairs. He knew of the charges by the will. He knew what the action was for and the various proceedings in it, and he knew that he was asked to lend moneys in respect of the

different items that had to be raised, and he knew the purposes for which they were raised, and to whom when raised they would go after his mortgage was executed. There was nothing in the proceedings in the action to lead Mr. Nightingale to suppose that he was to receive a security which would prejudice in any way the charge in favour of the annuity and of the Reynolds portion; and if he desired to obtain such a security he should have made his desire plain; and if he did not do so, and did not in fact obtain such a security, then he has only himself or his advisers to blame. It follows from the above observations that, looking to the order on further consideration as a whole, it is perfectly consistent with the original object and scope of the action, and with all the other proceedings in the action, and shews no intention whatever to interfere with or prejudice or affect the charges of the annuity and of the Reynolds portion. This brings me to a consideration of the mortgage deed itself, for the subsequent proceedings in the action, so far as material, were merely an approval by the Court of the form of mortgage to be executed, an ascertainment by taxation of the costs to be raised, a payment into court by Mr. Nightingale of the necessary moneys, and then the mortgage to him was executed.

From these proceedings I should have expected to find that the mortgage in favour of the mortgagee, approved of by the Court and executed, would be one that did not in any way enlarge or in any way prejudice the rights of those entitled to the annuity and to the Reynolds portion. And on perusal and consideration of that mortgage it fulfils my expectation, and, in my opinion, on its construction its effect is what I have above indicated.

The only parties to the mortgage deed are the plaintiff and the mortgagee. The recitals are full, and shew clearly all the material facts, and the rights of all persons interested in the mortgage property, and the proceedings in the action and what moneys had to be raised and advanced by the mortgagee and for what purposes. There is, however, a recital of a fact which did not appear from the proceedings in the action, and which is of some materiality. It appeared from this recital

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that the plaintiff as tenant for life had mortgaged his life estate to one George Durrant (who was in no wise party to or in any way bound by the proceedings in the action), and that this mortgage was still effective as against some parts of the estate, though what parts is not stated. Then, coming to the assurance by the plaintiff, it is important to notice the form in which he conveys. It is as follows: "He the said Henry Joseph Muskett as beneficial owner so far as relates to his estate or interest for life under the said recited will of the said Henry Muskett in the hereditaments intended to be hereby assured and so as to pass the full benefit of the charge created by the same will in priority to the said life estate or interest for the purpose of raising the portions of 5000*l.* and 5000*l.* provided respectively for the child or children of the said Julia Matilda Etheridge and for the children of the said Charles Burton Dashwood and Emily Louisa his wife and the interest on the same portions respectively and as trustee so far as relates to the estate or interest of the persons entitled in remainder in the same hereditaments hereby grants and conveys unto the said Samuel Nightingale." Now two points for observation arise from this. The first concerns the assurance by the plaintiff, "so far as relates to his estate or interest for life under the . . . . will," and "as trustee so far as relates to the estate or interest of the persons entitled in remainder." That carried out the order on further consideration in that behalf, and tends strongly to shew that the plaintiff was only authorized to convey the estate on behalf and in respect of the interests of those entitled to it, subject to the charges created by the will, and not on behalf or in respect of the interests of those entitled to the annuity and the Reynolds portion. The second point which gives rise to observation is that the plaintiff is made to assure so as to pass the full benefit of the two charges in respect of the two portions of 5000*l.* each which were being raised, and not so as to pass any right in respect of the Reynolds portion or of the annuity. The assurance in this respect is curiously framed from a strict conveyancing point of view, but the object of it is clear, and its effect is undoubted. The charges in favour of the two

portions paid off were clearly intended to be kept alive in favour of the mortgagee, and there is no difficulty in giving effect to the clear intention. This was of practical importance to the mortgagee, having regard to the mortgage on the life estate in favour of George Durrant, and Mr. Nightingale as against G. Durrant would have had to rely on the charges in respect of the two portions. Now these charges only ranked pari passu with the charges in favour of the annuity and the Reynolds portion, and could only be set up by the mortgagee as ranking pari passu, and it seems clear from this, as well as from the reference to the two raised portions, that it was contemplated that all the charges were to remain unaffected by the mortgage deed. Then comes the habendum shewing that the lands conveyed were to be held by the mortgagee with the full benefit of the enfranchisement intended to be made. And subject as to the life estate or interest of the plaintiff to the mortgage thereon and as to all the lands "without prejudice to any charge which may be subsisting therein under the said will," "subject to the proviso for redemption hereinafter contained (that is to say)," and then followed the proviso for redemption. Now on the construction of this part of the deed, I think its meaning and effect is that Mr. Nightingale was to hold subject to the existing charges, and not that the reference to those charges was merely made part of the proviso for redemption to be treated as if it had been put in at the end of the proviso. This view is, in my opinion, in accordance with the words employed when read according to their primâ facie and natural meaning. And it is borne out by the position and wording of the clause referring to the charges, and by the difficulty of treating that clause as intended to come in at the end of the proviso for redemption, where it would be difficult to read in the exact words used in the clause, namely, "and as to all the said hereditaments and premises without prejudice," &c. But still more strongly it is borne out by the other parts of the deed, and also by the difficulty of supposing that in such an action as that in which the mortgage was authorized, and after the proceedings in that action to which I have called attention, the Court intended to sanction or did

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sanction a mortgage which would interfere with the charge of the Reynolds portion, and still less one which would interfere with the annuity which was in no wise concerned with the portions.

I have now completed my examination of the deed, which, in my opinion, carefully and properly preserved the rights of those interested in the annuity and Reynolds portion without in any way enlarging them. But I will add a few words on the argument on behalf of the appellant which was much pressed upon us, and was based on the inconvenient nature of the security obtained by Mr. Nightingale, and on the alleged difficulty of supposing that he could have been expected to lend his money on such a security. In the first place, even admitting this to the full, yet it affords no sufficient ground for altering the view I have taken as to the effect of the deed, or for prejudicing or affecting those interested in the annuity and in the Reynolds portion. The mortgagee was, as I have already pointed out, made fully aware of all the circumstances of the case, and the deed was approved of on his behalf before he parted with his money. But, in my opinion, the inconvenience arising from the nature of his security has been much exaggerated. He obtained a mortgage on the whole estate subject only to such rights therein as existed in respect of the annuity and the Reynolds portion. It is not suggested that at the time he made his advance that security was not ample. It is the subsequent diminution in the value of the lands which has rendered the present question important. In respect of the security he obtained, he could have sold the estate, subject to the rights I have mentioned, under his power of sale, and could otherwise have enforced all the rights of a mortgagee. That he was not obtaining a security altogether free from difficulty is perfectly free from doubt, seeing that he knew of the mortgage of the life interest and the necessity of having the benefit of the charges of the two portions that were being raised. And it seems to me that any argument based on the exact amount of difficulty in the nature of his security is entitled to little weight.

It only remains for me to say a word as to the enfranchise-

ment money. I have pointed out that the rights of those interested in the annuity and in the Reynolds portion were in no way enlarged by the mortgage. Now there was good ground (which I need not further enter into) for saying that so far as the mortgagee's money went to pay for the enfranchisement he could support a claim to a first charge over the estate, or at any rate over the enfranchised portion. And so far as the respondents are concerned, it would not matter much whether that first charge was only on the enfranchised lands or on all the lands, and accordingly they appear not to have objected to the view that in respect of the enfranchisement money the mortgagee obtained a first charge—at any rate, there is no appeal by them from this part of the order. But that in no wise prejudices them in saying that as to the rest of his moneys the mortgagee has only the ordinary rights given to him by his deed. He knew exactly, and the proceedings and mortgage set forth, what moneys he was advancing and for what purposes, and any special security he may have obtained by reason of the purpose to which part was applied cannot enlarge his security in respect of the other moneys.

It appears to me that the order of Kekewich J. has at least given to Mr. Nightingale all the rights he was entitled to, assuming that the mortgage deed did not prejudice the rights of the respondents. As to the sum advanced for costs, those costs were clearly not chargeable in front of the charges of the respondents, but were payable by those entitled to the estate subject to the charges. I am not sure that the order so far as it covers the sum advanced for costs is not too favourable to the appellant; but as there is no counter-appeal on this head, I need not further consider the point.

I think, therefore, the appeal should be dismissed with costs. The Master of the Rolls desires me to add that he has seen and concurs in the judgment I have just read.

COZENS-HARDY L.J. I agree that this appeal must be dismissed, for the reasons stated by Romer L.J. in the judgment which he has read. But I desire to add a few words on the nature and frame of the action of *Muskett* v. *Muskett*. The

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sole plaintiff was the legal tenant for life, and the sole defendants were the legal remaindermen in fee, though the plaintiff was also the legal personal representative of the testator. No person interested in the annuity and portions charged upon the property was made a party. I doubt whether such an action could be maintained except on the footing that it was an action for the administration of the unadministered estate of the testator. It was treated as falling within Order XVI., r. 40, the annuitant and portioners being all served with notice of the judgment, and thus treated as being bound by the proceedings in the same manner as if they had originally been made parties. In short, they were regarded as legatees whose legacies were payable out of and charged upon the testator's real estate solely. In this view I think the Court had jurisdiction to direct the two legacies which were then raisable to be raised by mortgage or sale, and to give a mortgagee or purchaser a good title free from the claims of the Reynolds family. The Court was not bound to raise all the portions or legacies at once, and probably would not have done so against the wish of the Reynolds family.

But I agree with Romer L.J. that it rests upon the appellant, who asserts that that which was originally a pari passu charge has been postponed, to establish the proposition, and that there is no presumption in his favour. I have, reluctantly, come to the conclusion that there is nothing either in the orders of the Court or in the form of the mortgage settled by the Court which justifies us in giving the appellant any better or larger security than he has obtained under the judgment of Kekewich J. Nightingale, or his advisers, had all the documents before them, and it is not for us to consider how far their true operation and effect may have been misapprehended.

Solicitors: *Pasco Daphne; J. M. Yetts; Iliffe, Henley & Sweet.*

W. C. D.

SCOTT *v.* COULSON.

C. A. 1903 May 4.

[1902 S. 1982.]

Contract—Vendor and Purchaser—Mistake—Life Policy, Sale of—Death of Assured before Contract—Subsequent Knowledge by one Party—Assignment—Rescission after Completion.

A contract for the sale of a life policy was entered into by both parties in the belief that the assured was alive, and the contract was completed by assignment. Between the dates of the contract and the assignment the purchaser received information which led him to believe that at the date of the contract the assured was dead, which after the date of the assignment was ascertained to have been the fact, but the purchaser never disclosed his information to the vendor :—

Held, affirming Kekewich J., [1903] 1 Ch. 453, that the vendor was entitled to have the transaction set aside notwithstanding that it had been completed by assignment.

Appeal from the decision of Kekewich J. (1)

To the facts stated in the Court below should be added the following.

It appeared that although between the dates of the contract and the assignment the defendant Coulson had received information leading him to believe that the assured was dead at the date of the contract, yet the fact of the death did not become actually known to him or to his co-defendant, as a matter of certainty, until after the date of the assignment. On March 15, 1902, Coulson wrote to a friend of his living near Wymondham, where A. T. Death, the assured, had resided, asking him if he could find out whether Death was still residing there, and for information about him. To which the friend replied that he had made inquiries as requested, but could obtain no information except that no one of the name of "Death" was then living in Wymondham, and that the only person of that name in the place had, it was believed, died some twenty to thirty years back.

The action was brought against Coulson and Bevis, the

(1) [1903] 1 Ch. 453.

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purchasers of the policy, and also against the insurance company; but subsequently, upon the insurance company bringing into court the moneys due on the policy, less their costs, an order was made staying the action as against the company.

The plaintiffs, in their statement of claim, alleged that it was an implied term and condition of the agreement for sale and of the deed of assignment that the assured was at the dates thereof alive, so that in the circumstances both instruments were void; that the defendants Coulson and Bevis were at the date of the agreement, or alternatively at the time of completion, aware of the death of the assured, but failed to disclose the fact of such death to the plaintiffs; and that, by reason of such non-disclosure, the plaintiffs were entitled to have the agreement and deed set aside. Paragraph 7 was as follows: "In the alternative the said agreement and the said deed were entered into and executed by the plaintiffs and by the defendants Coulson and Bevis in ignorance of the fact that the said A. T. Death was dead." The plaintiffs then asked to have the agreement and the deed set aside, and for declarations that they were entitled to have the policy returned to them, and to payment of the moneys payable under it. In their statement of defence the defendants Coulson and Bevis admitted the allegation in paragraph 7 of the statement of claim.

At the trial Kekewich J. held, as already reported, that the plaintiffs were entitled to the relief they asked, with costs, as against the defendants Coulson and Bevis, and pronounced judgment accordingly.

The defendants, Coulson and Bevis, appealed.

The appeal was heard on May 4, 1903.

Stewart-Smith, K.C., and *St. John Clerke*, for the appellants. First, we submit that there was no mutual mistake.

[ROMER L.J. Before the assignment the purchasers were aware of the fact that the assured was dead. If they had so informed the vendors, the vendors would have been entitled to rescind the contract.]

We submit not. What the purchasers were buying was a covenant for payment of a sum of money in a certain event.

[ROMER L.J. I doubt if this case is arguable. Before the assignment you knew of the real facts; at all events, you were put upon inquiry. You must be taken to have known that the vendors were entitled to rescind.]

We were under no duty to tell the vendors; and even if we had to make the disclosure, still we would have been entitled to insist upon our contract.

[COZENS-HARDY L.J. referred to *Cooper* v. *Phibbs*. (1)

VAUGHAN WILLIAMS L.J. referred to *Taylor* v. *Caldwell*. (2)]

Secondly, even supposing there was a contract which could have been rescinded on the ground of mistake, then, on completion, assuming we were under no duty to disclose any fact coming to our knowledge, there could be no rescission. Non-disclosure may be a ground for refusing specific performance, as to which the Court has a discretion; but it cannot be said that personal ownership is altered by subsequent events. The moment a contract is completed by conveyance it cannot be rescinded through innocent misrepresentation, the rights of the parties having become fixed by the conveyance: *Wilde* v. *Gibson* (3), the principle in which case was applied in *Brownlie* v. *Campbell* (4) and in *Soper* v. *Arnold*. (5)

We further submit that the facts negative the inference that the learned judge drew as to the belief of the parties at the date of the contract. The plaintiffs allege ignorance on both sides of the fact that the assured was dead; and that allegation is admitted by the defendants.

[ROMER L.J. The inference to be drawn from the facts seems to me the only point on which the case can be argued.]

Warrington, K.C. (*Harry Dobb* with him), for the plaintiffs, after shortly going into the facts, was stopped by the Court.

VAUGHAN WILLIAMS L.J. On the facts of this case, if one takes those which were found by the learned judge in his judgment, I do not see what room there is for argument on any

(1) (1867) L. R. 2 H. L. 149.
(2) (1863) 3 B. & S. 826.
(3) (1848) 1 H. L. C. 605.
(4) (1880) 5 App. Cas. 925, 937–8.
(5) (1887) 37 Ch. D. 96; (1889) 14 App. Cas. 429.

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question of law." If we are to take it that it was common ground that, at the date of the contract for the sale of this policy, both the parties to the contract supposed the assured to be alive, it is true that both parties entered into this contract upon the basis of a common affirmative belief that the assured was alive; but as it turned out that this was a common mistake, the contract was one which cannot be enforced. This is so at law; and the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recognised as the basis is not true. Having regard to the evidence, it seems to be clear that the learned judge came to a right conclusion. If it had turned out that the vendors or their agent had requested Coulson to find out whether the assured was dead or alive, and Coulson had come back and said he could not find out, I should have said that, apart from argument, it would have been almost impossible to arrive at the conclusion that both parties had entered into the contract upon the basis that the assured was alive. But it turns out that no such inquiry was requested to be made. The only inquiry requested to be made was that contained in Coulson's letter of March 15, 1902, in which he requested inquiry to be made about the assured. Therefore the inference cannot arise which, if it had arisen, would have been fatal to the plaintiffs' contention that this contract was entered into upon the basis that the assured was still alive. If one gets rid of that, what is there left? We have before us the conditions of the proposed sale which were before both parties, in which it certainly seems to be assumed that the assured was still alive.

All I say with regard to the matter is that the material date all through is the date of the contract. If at that date a good contract was entered into, I cannot conceive that it could be rescinded. But it turns out that it was a contract entered into under a common mistake existing at the date of it, and therefore it follows that an assignment executed in pursuance of such a contract cannot be supported.

The learned judge has arrived at a right conclusion, and this appeal must therefore be dismissed, with costs.

ROMER L.J. I agree that this appeal must be dismissed. Upon the facts of the case it appears to me that the learned judge came to the right conclusion, namely, that the contract entered into between the parties to the sale and purchase of this policy rested upon the basis of the assured being still alive. It turns out that, before the matter was concluded by assignment to the defendants, the fact upon which the contract was based was not the fact. The defendant Coulson must be taken to have known that the basis upon which the contract had been entered into, and the common belief upon which both parties had acted, did not exist. That was a circumstance which went to the root of the matter, and rendered it improper to insist upon the completion of the contract. What did Coulson do when he received the information leading him to the knowledge or belief that the assured was dead? Did he do what he ought to have done—tell the plaintiffs? Not at all. He allowed the plaintiffs to go on under the old belief, and to execute the assignment on the footing that the old basis continued and that the defendants were entitled to an assignment. I need scarcely say that that was wholly unjustifiable from a legal point of view, and also from an equitable point of view, and none the less so because the defendants apparently thought they were justified in taking the assignment.

Such a transaction cannot be allowed to stand, and therefore this appeal must be dismissed.

COZENS-HARDY L.J. I agree. I think the case was argued by Mr. Clerke in the only possible way it could be put on behalf of the defendants. Having regard to the facts as found by the learned judge, it appears to me to be quite plain that at the date of the contract there was a common mistake, both parties being under the belief that the assured was alive.

It would be quite shocking to say that the defendants have rendered the contract absolute simply by having obtained from the vendors an assignment after one of the defendants, Coulson, had full notice that the basis on which the contract had been entered into had had no existence. Under such circumstances

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it is impossible that the defendants can be allowed to derive any benefit from the assignment.

The appeal must, therefore, be dismissed with costs.

Solicitors: *Dubois & Williams, for R. C. & S. Burrows, Cambridge; Walker, Son & Field, for A. A. Walker, Cambridge.*

G. I. F. C.

C. A. 1903 *May* 5, 11, 12.

In re INNES & CO., LIMITED.

[00348 of 1901.]

Company—Winding-up—Contributory—Sale of Business to Company—Contract—"Sham" or "Illusory" Contract—Fully paid Shares—Gifts of Shares—Allotment to Vendor's Nominees—Consideration, Want of—Private Company—Directors—Misfeasance—Ultra Vires.

Two brothers, who carried on the business of working a steam-boiler patent in partnership, arranged with six shipowners to form a private company to take over the business and patent rights in consideration of 6000*l.* payable half in cash and half in shares, the capital of the company to be 25,000*l.* in 2500 shares of 10*l.* each, which were to be distributed as follows: The six shipowners were each to take fifty shares and pay for them in cash for the purpose of raising the 3000*l.* payable in cash to the vendors, and the vendors were to take 300 fully paid shares as the balance of their purchase-money. Of the remaining 1900 shares, each of the six shipowners was to take 300 fully paid shares for his own benefit, and 100 fully paid shares were to be placed in the joint names of three of them, who eventually, on the formation of the company, became directors, to be applied in rewarding persons who should bring business to the company. The company was incorporated, and the only shareholders were the vendors and the six shipowners. In order to give effect to the above arrangement, an agreement was entered into between the vendors and the company whereby the vendors purported to sell their business and patent rights to the company for 25,000*l.*, as to 3000*l.* in cash and as to 22,000*l.* by the allotment to the vendors or their nominees of 2200 fully paid shares, and this agreement was duly registered. Of these 2200 shares, 300 were allotted to the vendors, and, on the nomination of the vendors, the remaining 1900 were allotted, as to 100 to the three directors jointly for the purpose above mentioned, and as to 1800 to the three directors and the other three shipowners in equal shares for their own benefit, the whole of the 2200 shares being so allotted as fully paid.

Upon a summons by the liquidator in the winding-up of the company

against the three directors to render them liable as contributories for payment of the full amount of all the shares allotted to them:—

Held, reversing Kekewich J., [1903] 1 Ch. 674, that the case was covered by *Carling's Case*, (1875) 1 Ch. D. 115, and therefore that the directors could not be placed upon the list of contributories as holders of unpaid shares.

APPEAL from the decision of Kekewich J. (1)

To the facts stated in the report below it may be added that after the execution of the agreement, and with a view to carrying out the arrangement previously entered into between the two Messrs. Innes (the vendors) and the six shipowners, each of the latter took, and paid for in cash, fifty of the 2500 10*l.* shares in the company, or 300 shares in all, the proceeds going to the Messrs. Innes in payment of half the purchase-money of 6000*l.* Out of the remaining 2200 shares the other half of the purchase-money was provided by the allotment to the Messrs. Innes in equal shares of 300 shares as fully paid. There thus remained 1900 shares to be dealt with. Of these, 100 were, on the nomination of the vendors, issued as fully paid to three of the shipowners, Messrs. Cockerline, Samman, and Hagerup, in their joint names, to be distributed as occasion required by way of reward to persons who might bring business to the company; and, upon the further nomination of the vendors, the remaining 1800 shares were allotted as fully paid equally among the six shipowners, each of whom thus took 300 fully paid shares for his own benefit. These six shipowners, Robert Innes, and one Jones, eight in all, were the only shareholders in the company. Robert Innes, Cockerline, Samman, and Hagerup were the first directors of the company.

The liquidator's summons was taken out against all four directors, and asked—(1.) A declaration that each of the respondents, Cockerline, Samman, and Hagerup, was liable to contribute the sum of 3000*l.* in respect of the 300 shares allotted to him, and that the respondent Robert Innes was liable to contribute the sum of 1500*l.* in respect of the 150 shares allotted to him: (2.) A declaration that all the respondents

(1) [1903] 1 Ch. 674.

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were jointly and severally liable to make good to the company the loss sustained or to be sustained by the company (*a*) by reason of the issue of the 2200 shares as fully paid without payment or consideration in respect of any of such shares; or (*b*) alternatively, by reason of the company being deprived of the right of allotting the said shares to persons who would have paid for them in full in cash: (3.) Alternatively, a declaration that each of the respondents was liable to account to the company for the profit made by him under the agreement of March 23, 1900: (4.) Alternatively, a declaration that the respondents were jointly and severally liable to contribute to the assets of the company damages or compensation for their misfeasance or breach of trust in causing or allowing the company to enter into the said agreement and to purchase the business of Innes & Co. at an overvalue: with consequential relief.

At the hearing of the summons the case as against the respondent Robert Innes was not proceeded with.

Kekewich J. made an order declaring that each of the respondents, Messrs. Cockerline, Samman, and Hagerup, was liable to pay the sum of 3000*l.* in respect of the 300 shares held by him, and that the same three respondents were jointly liable to pay the sum of 1000*l.* in respect of the 100 shares jointly held by them, and that the said several sums were payable on the footing that nothing had been paid up on any of such shares; and the same three respondents were ordered to pay to the liquidator his taxed costs of the application. As to the respondent Robert Innes, no order was made against him either as to costs or otherwise.

From that order the three respondents, Messrs. Cockerline, Samman, and Hagerup, by leave, appealed.

The appeal was heard on May 5, 11, and 12, 1903.

Upjohn, K.C., and *A. H. Jessel*, for the appellants. As to the claim to make the appellants liable as contributories in respect of the shares which were allotted to them as fully paid, *Carling's Case* (1) is practically identical with the present case,

(1) 1 Ch. D. 115.

and it shews that the appellants stand in the same position as if the shares had been allotted to the vendors and then transferred by them to the appellants. The appellants never entered into any contract with the company to take shares other than fully paid shares. The effect of the decision of the Court below is to make a new contract. It is submitted, therefore, that the appellants cannot be placed on the list of contributories. Nor, it is contended, can the claim for misfeasance be maintained. It is true that in *Carling's Case* (1) the decision that the directors were not liable as contributories was expressed to be without prejudice to any application to make them liable for a misfeasance. But in the present case no prospectus was issued of the company; the public were not invited to come in, and it was never intended that there should be any but the eight shareholders, who knew and were parties to what was done, and were at liberty to divide the shares among themselves in any proportions they chose. None of the shares were dealt with. Under such circumstances a claim for misfeasance cannot be maintained: *In re Ambrose Lake Tin and Copper Mining Co.* (2); *In re British Seamless Paper Box Co.* (3); *In re Postage Stamp Automatic Delivery Co.* (4); *Salomon* v. *Salomon & Co.* (5) No doubt this argument could not be maintained if other shareholders had afterwards come in, but there never were any but the eight shareholders, who knew all that was done. And creditors have no independent right: it was immaterial to them what the nominal capital of the company was. The company acquired all the property which it was agreed they were to have in exchange for the capital.

Gore-Browne, K.C., and *W. H. Cozens-Hardy*, for the liquidator. A number of shares in the company have been issued for which in fact nothing has been paid. A shareholder is bound to pay for his shares "in meal or in malt." In the case of a limited company registered under the Companies Acts, the amount of the capital appears on the register, and this is a very important matter to creditors. A creditor has a right to

(1) 1 Ch. D. 115.
(2) (1880) 14 Ch. D. 390.
(3) (1881) 17 Ch. D. 467.
(4) [1892] 3 Ch. 566.
(5) [1897] A. C. 22, 33, 57.

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assume that the company has acquired assets which may be fairly treated as worth the capital. This must influence a person who is giving credit to the company. In the present case the price given for the property acquired was not the valuation price, but a much larger one. An illusory consideration, or one which is obviously of a money value less than the amount of the capital, will not support the transaction. The transaction would really amount to an issue of shares at a discount, and that is illegal: *Ooregum Gold Mining Company of India* v. *Roper*. (1) It was ultra vires to give 25,000*l*. for a property which, as all the parties knew, could be purchased for 6000*l*. It may be said, too, that a commission was paid for the issue of shares, and that is equally unlawful. In all such cases the shareholder might say that he would not have taken the shares on any other terms than those on which he did agree to take them, but still he cannot in that case escape liability. Even if the consideration for the shares is paid, not in cash but in kind, still it must be paid in full without any discount: *Chapman's Case*. (2) Here nothing was given for the shares allotted to the appellants. A nominee of shares stands in no better position than a transferee, who stands in the same position as his transferor. *Carling's Case* (3) is distinguishable from the present case, for there was nothing there to shew that the price of the property had been deliberately inflated for the purpose of giving a bonus or commission to the directors. And, moreover, when *Carling's Case* (3) was decided it had not been established that shares could not be issued at a discount. That was not clearly settled until *In re Almada and Tirito Co.* (4)

The whole transaction is a "sham"—a "colourable" one: *In re Wragg, Limited*. (5) The liability of a shareholder to pay the company the amount of his shares is a statutory liability, and it is beyond the power of the company to release him from his obligation. A company cannot give fully paid-up shares for nothing, and preclude itself from requiring payment of them in money or money's worth; and where consideration

(1) [1892] A. C. 125.
(2) [1895] 1 Ch. 771.
(3) 1 Ch. D. 115.
(4) (1888) 38 Ch. D. 415.
(5) [1897] 1 Ch. 796, 815.

in kind is given it can be inquired into, for the Court can go behind the contract. (1)

As to the misfeasance part of the summons, we submit that the Messrs. Innes were trustees for the company of the shares which they gave away to their nominees, and the persons to whom they gave them can be in no better position. These gifts were ultra vires: *In re George Newman & Co.* (2), which is precisely similar to the present case.

[VAUGHAN WILLIAMS L.J. There the presents were made out of capital by directors to themselves. Here the gifts are by the company's vendors, one of whom is a director, out of their own pockets, to directors.]

Even assuming the gifts were not ultra vires, they were not sanctioned by a general meeting of the company, which we submit was necessary, in order to render them valid: *In re George Newman & Co.* (2)

[ROMER L.J. A general meeting was necessary in that case because several of the shareholders were infants.]

VAUGHAN WILLIAMS L.J. This case has been argued at some length, but I do not propose to deliver a very long judgment.

This summons was taken out by the liquidator of the company against the directors of the company, Messrs. Cockerline, Samman, Hagerup, and Robert Innes, in effect for a declaration that the respondents were liable as contributories for the full amount of certain shares allotted to them respectively as fully paid up; and, in the alternative, for a declaration that they were jointly and severally liable for misfeasance in causing or allowing the company to purchase the business of Messrs. Innes & Co. at an overvalue. At the hearing of the summons the case as against Mr. Robert Innes was not proceeded with, and no order was made against him, so that the present appeal is by the three other directors only.

Now, dividing the claim here into a claim for misfeasance, and into a claim independently of that, namely, a claim for money due from the respondents to the company, Kekewich J.

(1) [1897] 1 Ch. 814, 817, 829, 835, 838, 842-3. (2) [1895] 1 Ch. 674.

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does not come to any finding upon the misfeasance part of the summons. He expresses his doubt whether, on that part of the summons, the respondents could be held to be liable, and he proceeds to deal with the summons independently of so much of it as related to misfeasance; but on that part of the summons which he did deal with he gave judgment against the three respondents, the present appellants; and we have now to say whether that judgment was right or not.

The suggestion on this summons really is that in some way or other the respondents had received the shares which they had received—except as to the shares which they had paid for in cash—without having given any consideration for those shares; and the learned judge came to that conclusion. This was a company which was formed as a private company, and everything that was done in this case was done with the full knowledge of all the eight members; and the result was this—that there being this company formed for the purchase of the business of Messrs. Innes, a contract was entered into under which the business of Messrs. Innes was sold to the company, and part of the consideration payable by the company to Messrs. Innes consisted of fully paid-up shares. It is not disputed that, of these fully paid shares which purported to be allotted to Messrs. Innes for the purchase of this business, the appellants, these three directors, received, each of them, 300 10*l.* shares—that is, fully paid shares; and it is said that these shares were not in any shape paid for either by the three directors who were not vendors, or by Mr. Robert Innes, who represented the vendors. It is said that the real price at which this business was sold to the company was the cash price, and nothing else, and that the transaction really constitutes a gift to these three directors of these shares either by the company or by the vendors. The shares so given apparently purported to be a part of the consideration payable to the vendors under the contract upon the purchase of the business, and the contract has not been impeached in any way. The contract stands, and therefore the property, the subject of the sale and purchase, passed to the company. In the circumstances what happened was that these

shares which were allotted directly by the company to these three directors were allotted to them upon the nomination of the vendors; and some sort of suggestion is made that, because these directors took these shares as allottees, you must, in dealing with the transaction, treat any nomination by the vendors as being out of consideration, and treat the transaction as simply a transaction between the company and the directors. It is impossible now to argue that that is so. You must treat the transaction according to the facts—that is, as a transaction in which there was a contract which entitled the vendors to have fully paid shares placed at their disposal, and under which contract they nominated these directors as the persons to whom the shares were to be allotted—that is to say, as a transaction in which there was, prior to allotment, no application for shares, and no contract between those persons and the company with reference to the allotment of shares. Under these circumstances, how is it possible for us to ignore the facts of this contract having been entered into for the sale of this business to the company on certain specified terms, and of these nominations having been made in pursuance of that contract?

It is said, however, that even if one does treat the matter according to the facts and have regard to the contract for sale and purchase, and to the nominations by the vendors of the persons to whom fully paid shares were to be allotted, yet we ought to treat these shares allotted to the directors as shares which were taken without any consideration at all; because it is said that we ought in this case to regard this business, and these business assets, as being of the value of 6000*l.*, and that we ought to treat the fully paid shares which were given beyond that limited price as being not really part of the consideration for the purchase, but as being a gift which was made by the company to the vendors for the purpose of being handed on to these directors; and that we ought not to regard these fully paid shares as having been paid for either in meal or in malt. That was the argument on the part of the liquidator. Many authorities have been cited to us—beginning with *In re Almada*

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and Tirito Co. (1), and going on to the *Ooregum Case* (2) and *Chapman's Case* (3)—in which it was said that the Court is not bound by the terms of the contract, but may go behind it and see whether the price paid by the company for the property they were acquiring was not in truth and in fact a mere gift. We are invited to say that the transaction in this case was a colourable transaction, and that, under the pretence of being a transaction of purchase, it was one of gift, or, if not of gift, one of payment of a commission for placing the capital of the company. That is a mere question of fact; and I cannot agree that we ought to come to any such conclusion of fact at all. It is not suggested by the liquidator that these gentlemen have been guilty of any fraud upon either branch of the summons: therefore we have a contract under which these fully paid shares were part of the price for the property which was purchased. Why should we draw a contrary conclusion? The contract is not impeached. It cannot be suggested that mere inadequacy of price was sufficient of itself to invalidate the contract. You must shew that, these shares not having been paid for at all, the contract for purchase was a colourable transaction, and that in truth and in fact, quâ value, these shares were not part of the consideration, but were a gift. I see no ground whatever for coming to that conclusion. It seems to me, when one looks at the whole of the facts, that it was a most natural transaction that the vendors here, when they were selling this property, should consider it a reasonable thing to do, not only to ask for the cash payment, but also to ask for the payment of this large sum in fully paid shares. And although we have not to go into the question of the goodness or the badness of that bargain on the part of the company, there is, in my judgment, nothing in that bargain to lead us to the conclusion that it was not in truth made by persons who were honestly acting in what they conceived to be the interests of the company. I do not propose to go into the evidence at length: it is sufficient for me to say that I see in it nothing to lead me

(1) 38 Ch. D. 415. (2) [1892] A. C. 125.
(3) [1895] 1 Ch. 771.

to hold that this transaction was not a real but a colourable transaction.

The only other observation I have to make is upon a suggestion with regard to the large amount which was given in these fully paid shares, amounting to 22,000*l.* I can only say that I entirely agree with Mr. Upjohn's view that, once you arrive at the conclusion that there was a real contract for sale and purchase and that the company did in fact get the property, it is really a matter of perfect indifference how the shares were divided among these eight shareholders, or whether each treats his eighth as an eighth of 2500 shares, or as an eighth of the smaller sum.

In my judgment, under the circumstances there is nothing more to be said with regard to that part of the case on which Kekewich J. arrived at a contrary conclusion to ours.

With regard to the misfeasance part of the summons, it seems to me that, when once you have arrived at the conclusion of fact at which we have arrived in this case, the argument upon that part of the summons must fail.

In my opinion, therefore, we must reverse the judgment of the Court below, and order judgment to be entered for the appellants.

ROMER L.J. I have come to the same conclusion. When the arguments on the part of the respondents are carefully analyzed, it will be found that, for their validity, they really depend on two assumptions. The first assumption is this, that before the company was formed and the contract was made and became binding upon it, Messrs. Innes and the shipowners were all willing and had arranged that Messrs. Innes should sell the business to the company for 6000*l.* only, 3000*l.* being in cash and 3000*l.* in shares. Now I cannot agree in that assumption of fact at all. I do not think Messrs. Innes would have been willing to sell to the company unless, as part of the terms of sale, they had obtained such a hold over the share capital as would enable them properly and legally to carry out the negotiations for the sale as between themselves and the other six gentlemen. It was, to my mind, most important to

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Messrs. Innes that they should obtain the confidence in the company of the six shipowners, and that they should all be interested in the capital and have the capital to themselves in the proportions in which they had arranged between themselves. And, to my mind, the negotiations between those parties and the arrangement come to, so far as they were contemplated at all, were quite consistent with the view that the purchase-money as between the Messrs. Innes as vendors and the company as purchaser should be fixed at 25,000*l.*, as to 3000*l.* in cash and as to 22,000*l.* in fully paid shares, and that the six should get from Messrs. Innes such part of the 22,000*l.* worth of shares as had been arranged between them; and, in my opinion, if such arrangement had not been in view and obtained legal effect, there would have been no sale at all, and no company would have been formed. It follows, therefore, that the first assumption upon which the argument of the liquidator depended goes by the board.

The second assumption upon which the liquidator relied is this, that this appeal must be decided on the same footing as if a contract had been made by the two Messrs. Innes to sell to the company for 6000*l.* Now, that assumption is, to my mind, one that it is impossible to adopt. There was no such contract existing at all, and the contract which was in fact made and registered was a contract which would, in my opinion, carry out what were the real intentions of the parties at that time, and would do so notwithstanding the prior negotiations between the two Messrs. Innes and the six shipowners. What took place before the registered contract was made constituted no agreement affecting the company, and the company had nothing to do with it. But for the registered contract, and except on the footing of the contract that was made, the company never would have acquired the patent rights and business of the Messrs. Innes that were sold to the company. And further, when one looks at the registered contract, it is, in my opinion, not one which could, in the circumstances, be severed or split up and treated as two contracts, one as a sale by Messrs. Innes for 6000*l.*, and the other as a contract to sell to the shipowners for 22,000*l.* In my opinion the registered contract cannot be

so split up, and it is impossible to treat the shares issued to the shipowners either as shares allotted without any consideration at all or as allotted at a discount. Therefore the second assumption, upon which the liquidator relied, cannot be supported.

Dealing with the rest of the case, it appears to me to be clear that the ground upon which the case was decided in the Court below against the appellants cannot be maintained. It is impossible, in my opinion, to place the appellants on the list of contributories as holders of unpaid shares. The case is really governed by the decision of the Court of Appeal in *Carling's Case*. (1) There was no application to the company for these shares by any of these appellants, and no contract as between them and the company by any of them to take shares. They only acquired the shares as nominees of Messrs. Innes by virtue of the rights of Messrs. Innes under the registered contract, and it is impossible to treat these shares in the hands of the appellants as unpaid shares. Whatever rights there may be against the appellants in other respects, they cannot, according to *Carling's Case* (1), be treated as holders of unpaid shares.

The only other ground that can be urged against them is that of misfeasance; but the facts of the case negative the view of the liquidator on that point. The facts are that the shareholders were only eight in number, and they were all sui juris. No others were invited to join, and it was not contemplated that any others should be invited to join. That being so, the company as a whole—that is, all the shareholders—knew of these shares being given to these six shipowners. Under those circumstances the company could not impeach the gifts after the gifts had been made (assuming for this purpose that they were gifts), nor could the company, after having assented by all its shareholders, call upon the six shipowners to refund either the gifts themselves or their value. There is no question of ultra vires of the company, nor of any act which could only be validated by virtue of a general meeting of the company.

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The case is one in which the transaction could not be impeached after having been entered into with the consent of all the shareholders. The creditors have no right and the company had no right to do so. The creditors are not deceived. If they had chosen to look at the registered contract they would have found that all the shares in the company had been fully paid up: they would have seen that the property of the company consisted of patents and other rights acquired by the company, and they would have seen what the consideration for the acquisition by the company of the property was: consequently the creditors could not have alleged misfeasance so as to make these six shipowners liable for the shares which they had received from the vendors. Therefore the decision of the Court below cannot be supported on that ground, and it was not attempted in the Court below to put the case on that ground. Accordingly, in my opinion, this appeal succeeds.

COZENS-HARDY L.J. I find myself unable to adopt the view of Kekewich J. in this case. There are two points here for decision. If the question were now raised for the first time, a good deal might be said in support of that part of the application which sought to charge these directors with misfeasance. It is conceded that if there had been in fact other shareholders at the time, or any intention that there should be other shareholders, the directors might have been held liable. On principle, it is not easy to appreciate the distinction between a private company and a public company. It might have been more satisfactory to say that in each case the mere knowledge and acquiescence of all the shareholders, not manifested by a formal resolution of the company in general meeting, ought not to suffice to condone a breach of trust in the event of the subsequent winding-up of the company. But the authorities have, in my view, decided the contrary, and the misfeasance part of the summons cannot, therefore, be supported.

As to the other part of the summons, I can find no ground for holding the appellants liable unless the Court is prepared

to overrule *Carling's Case* (1), and the subsequent authorities which have followed it, which, of course, is impossible. There was only one contract between the vendors and the company—not even one contract in two parts—probably a voidable contract, but it cannot now be avoided or impeached. The Court cannot go into the question of the consideration. The vendors—as between themselves and the company—were entitled to these shares as fully paid up, and were entitled to have them allotted to their nominees. The agreement between the vendors and the directors as to the disposal of part of the purchase price receivable from the company does not make the contract of sale between the vendors and the company "a sham" or "illusory." In my opinion, therefore, this appeal must be allowed.

Solicitors: *F. W. Hill, for Hearfields & Lambert, Hull; Burn & Berridge, for J. R. Farrar, Halifax.*

(1) 1 Ch. D. 115.

G. I. F. C.

C. A.
1903
May 26, 28.

LAMBOURN *v.* McLELLAN.

[1903 L. 19.]

Landlord and Tenant—Trade Fixtures—Tenant's Right of Removal—Lease—Covenant to yield up at end of Term—Construction—General Words—Ejusdem Generis.

A lease to a tenant, who was therein described as a boot and shoe manufacturer, contained a covenant by the tenant to yield up the demised premises on the determination of the term, together with all doors, locks, keys, &c., wainscots, hearths, stoves, marble and other chimney-pieces, &c., "and all other erections, buildings, improvements, fixtures, and things which are now or which at any time during the said term hereby granted shall be fixed, fastened, or belong to" the demised premises. The word "machinery" did not occur in this covenant. There was also a covenant by the tenant that he would not carry on in the demised premises any trade or business, except that of a boot and shoe manufacturer, without the licence of the lessor, and that the tenant would not erect on the premises any machinery other than that propelled by hand or foot without the consent of the lessor.

The tenant placed in the premises for the purposes of his business various machines, which for their more convenient user were fastened by screws or nails to the floor or to the walls of the premises.

The tenant having become a bankrupt, the trustee in the bankruptcy desired to sell the machinery separately from the premises:—

Held, that the general words in the above covenant must be construed as applying only to things ejusdem generis with those described in the previous particular enumeration, which were of the nature of "landlord's fixtures," and that the tenant was not deprived of his ordinary right to remove trade fixtures, such as the machinery in question, and that consequently the trustee was entitled to sell the machinery.

Decision of Kekewich J., [1903] 1 Ch. 806, reversed.

When in such a covenant the things particularly enumerated belong to one genus—such as landlord's fixtures—general words which follow must be construed as applying only to things of the same genus.

Bishop v. *Elliott*, (1855) 11 Ex. 113, followed.

APPEAL from the decision of Kekewich J. (1)

The question was whether under the provisions of a lease the tenant was entitled to remove trade fixtures.

By an underlease, dated February 16, 1899, made between Thomas Nixon of the one part and Louis Solomons, who was described as a "boot and shoe manufacturer," of the other

(1) [1903] 1 Ch. 806.

part, Nixon demised to Solomons a messuage and premises, known as No. 6, Crispin Street, Spitalfields, "now in the occupation of the lessee," for the term of twenty-one years from September 29, 1898, at the yearly rent of 95*l.* during the first two years of the term, and for the remainder of the term at the yearly rent of 100*l.*, payable quarterly, subject to the covenants thereinafter contained on the part of the lessee.

The lessee covenanted (inter alia) to repair and keep in repair the inside of the messuage and premises, "And the same and every part thereof, with the glass windows, window panes, wainscots, floors, partitions, and ceilings, and the inside of the said premises being so well and sufficiently and substantially repaired, upheld, supported, sustained, maintained, painted, glazed, papered, whitewashed, leaded, cleansed, scoured, preserved, amended, and kept in repair as aforesaid, shall and will at the end and expiration or other sooner determination of the said term hereby granted peaceably and quietly leave, surrender, and yield up unto the lessor, together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stoves, marble and other chimney-pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales, rails, dressers, shelves, and all other erections, buildings, improvements, fixtures, and things which are now or which at any time during the said term hereby granted shall be fixed, fastened, or belong to the said messuage and premises or any part thereof." There was also a covenant that the lessee would not carry on in any part of the demised premises any trade or business, except that of a boot and shoe manufacturer, without the licence of the lessor, and that the lessee would not erect on the premises any machinery other than that propelled by hand or foot without the consent of the lessor.

There was a proviso for re-entry by the lessor in case the rent reserved, or any part thereof, should be unpaid for twenty-one days after any of the days on which the same ought to have been paid, or in case of the breach or non-observance or non-performance of any of the lessee's covenants.

The lessee erected in the premises machinery of the kind authorized by his lease.

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Nixon held the premises for a term of fifty-eight and a half years from March 25, 1856, and on May 30, 1902, he mortgaged them by way of underlease for the remainder of that term, less the last ten days thereof, to Jabez Lambourn.

In November, 1902, Solomon was adjudicated a bankrupt, and Henry McLellan was appointed trustee in the bankruptcy. He advertised for sale on the premises some machinery and fixtures which the bankrupt had placed there for the purposes of his business, and which were fastened, as will be presently mentioned, to the demised premises. The particulars of the machinery are stated in the former report, and it is unnecessary to repeat them.

This action was commenced on January 3, 1903, by Lambourn and Nixon against the trustee in the bankruptcy, claiming a declaration that the defendant was not entitled to remove, or cause the removal of, certain articles specified in the statement of claim, or any of them, "or any other erections, buildings, improvements, fixtures, or things which now are or at any time during the term created by the underlease of February 16, 1899, have been or shall be fixed, fastened, or belonging to the messuage and premises demised by the said underlease, or any part thereof, from the said demised premises." The plaintiffs also claimed an injunction to restrain the defendant from removing any of the articles in question, and from selling them separately from the premises.

By an affidavit made by an auctioneer it appeared that of the machines in question some were fastened by nails to the wall of the premises; others were fastened by screws to the floor; others were not attached in any way, but merely rested on the floor; and one was fastened by screws to wooden blocks which were fixed to the floor. There was also some belting connecting a machine with some shafting, which ran along the top of the room, and was fixed by bolts and nuts to blocks, the blocks being fixed by bolts and nuts to the joists in the ceiling of the room. The witness said that all the machines could be removed without causing any damage to the premises.

At the trial of the action, on March 13, 1903, Kekewich J. held that the articles in question came within the general

words of the lessee's covenant to deliver up the demised premises, and that the defendant was not entitled to remove them. The learned judge was of opinion that the case was governed by the decision of Lord Romilly M.R. in *Bidder* v. *Trinidad Petroleum Co.* (1) upon the construction of a covenant the words of which were nearly the same as those of the covenant in the present case. In his Lordship's opinion *Bishop* v. *Elliott* (2) was distinguishable.

The trustee in the bankruptcy appealed.

Stewart-Smith, K.C., and *E. Ford*, for the trustee. There are no words in the covenant which can carry machinery, unless the general words do so, and it is submitted that they do not. The parties to the lease knew that they were dealing with premises in which machinery would be used, as is shewn by other provisions in the lease, and yet in the covenant to deliver up the premises at the end of the term machinery is not mentioned. The general words ought to be restricted to things ejusdem generis with those which are particularly enumerated previously: *Bishop* v. *Elliott*. (2) Here the things which are particularly enumerated are of the nature of landlord's fixtures—i.e., things which pass with the freehold. In *Bidder* v. *Trinidad Petroleum Co.* (1) some things were specifically mentioned which were of the same kind as those to which it was sought to apply the general words. *Bishop* v. *Elliott* (2) really governs the present case, for there the words of the covenant were almost identical with those of the covenant here. In *Dumergue* v. *Rumsey* (3) the same general rule is recognised. In *Wilson* v. *Whateley* (4) no question arose about trade fixtures.

[VAUGHAN WILLIAMS L.J. Some of the words used in the present case might apply to tenant's fixtures.]

It is submitted that the onus is upon the landlord to shew that there are words which clearly deprive the tenant of his ordinary right to remove trade fixtures.

Warrington K.C., and *J. Rolt*, for the plaintiffs. The articles in question were "fixed" to the demised premises,

(1) (1868) 17 W. R. 153.
(2) 11 Ex. 113.
(3) (1863) 2 H. & C. 777.
(4) (1860) 1 J. & H. 436.

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and are therefore clearly within the general words of the covenant, unless those words are to be cut down. Though machinery is not expressly mentioned in the covenant, yet these machines are "erections." The words of the covenant are as wide as possible; any fixture would come within them. There is nothing to cut down the natural meaning. The words are not confined to a particular class. If the appellant is right, the words "erections and buildings" might as well be struck out of the covenant. There were no such words as "erections and buildings" in the covenant in *Bishop* v. *Elliott.* (1) Those words ought to receive their natural meaning, and then they clearly include these machines. There is nothing to shew that they are to be cut down to things ejusdem generis with those which are particularly enumerated.

[ROMER L.J. referred to *Haslett* v. *Burt.* (2)]

Wilson v. *Whateley* (3) has a material bearing on the present case. The onus is on those who seek to cut down the meaning of general words: *Anderson* v. *Anderson.* (4) In the present case there is nothing to shew that the general words ought to be limited to things ejusdem generis with those which are particularly enumerated, and it is submitted that the general words ought to be read in their natural sense, which clearly includes these machines.

Stewart-Smith, K.C., in reply. If the general words are construed literally they would include carpets and chattels fixed to the wall merely to prevent them from falling. This could not have been intended. The things particularly enumerated are of the nature of "landlord's fixtures," and the word "fixtures" should be read in the same way. Machines of this kind have been held to be chattels distrainable for rent: *Hellawell* v. *Eastwood.* (5) The present case is really undistinguishable from *Bishop* v. *Elliott.* (1) The covenant cannot be read literally: *Dumergue* v. *Rumsey.* (6) The machines are not an "improvement" to the building, except for the purpose of its use as a boot and shoe manufactory.

(1) 11 Ex. 113.
(2) (1856) 18 C. B. 893.
(3) 1 J. & H. 436.
(4) [1895] 1 Q. B. 749.
(5) (1851) 6 Ex. 295.
(6) 2 H. & C. 777.

[ROMER L.J. referred to *West* v. *Blakeway*. (1)]

If machines are included in this covenant, the tenant could not remove any machine which he had fixed at any time during the term; he would be bound to keep it there till the end of the term, and this might make his business unworkable.

VAUGHAN WILLIAMS L.J. I quite agree with the observation of Kekewich J., that the authorities which were cited to him, and which have been cited to us, do not leave the question of the construction of this covenant very clear, and, as the learned judge also said, that it was high time for the covenant to be construed by the Court of Appeal.

We have had to consider this covenant, and I have come to the conclusion that it does not impose on the tenant the obligation of yielding up on the determination of his term trade fixtures of the class which are described in an affidavit which has been accepted by both sides as fairly describing them. Without going through the affidavit in detail, I may say generally that it shews that this trade machinery is not of a kind which when put up becomes in any sense an integral part of the building or an addition to the building. On the contrary it is, I think, plain that the connection of the machinery with the building was only for the more convenient user of the machinery for the purposes of the business. Some part of the machinery could no doubt be used in connection with other machinery, if put there. But I do not think that any of the machinery was fixed to the premises for their improvement; the machinery was fixed there only for its more convenient user. Having said this, I now look at the lease. In it the tenant is described as a "boot and shoe manufacturer," and it is plain that it was contemplated by the parties that he should carry on that business on the demised premises. That is plain also because the lease contains an express reference to machinery for the purpose of that business, and there is a provision that no machinery other than that propelled by hand or foot shall be erected without the consent of the lessor. This being the relation of the parties and the

(1) (1841) 2 Man. & G. 729; 58 R. R. 563.

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intention of both of them as to the user of the premises, there comes the covenant by the tenant for the delivery up of the premises at the end of the term which contains the words which we have to construe. [His Lordship read the covenant.] There can be no doubt that primâ facie, apart from express agreement, trade fixtures would have been removable by the tenant under such a lease at the end of his term, and we have therefore to see whether, according to the true construction of the words of the covenant, they take away from the tenant that right of removal. Looking first at the things particularly enumerated in the covenant ending with the word "shelves," it is not easy to say of any one of them that it might not be of such a character that under the ordinary law, if not altered by agreement, it would not be removable by the tenant. They are all such as are generally described as "landlord's fixtures." That is not a happy expression, for it is sometimes used in another sense, namely, as denoting fixtures of which the landlord would take an inventory at the commencement of the term. But I am using the expression as meaning fixtures which under the ordinary law by reason of their attachment to the premises the tenant would not be entitled to remove as against his landlord. Of the articles described in the particular enumeration I may say that, although some of them might conceivably be in the nature of removable fixtures, there is not one which might not just as well be an irremovable fixture. It is, however, quite plain that the particular enumeration does not include this machinery; from beginning to end of the covenant the word "machinery" is not used. But when we find a lease of premises for the express purpose of their being used for the manufacture of boots and shoes by machinery, it is as a matter of business very difficult to believe that, if the landlord intended that the machinery should not be removable by the tenant, even when it was fixed in such a way as it is fixed here, he should not have said so in plain words. It is a very important matter, and yet machinery is not mentioned in the covenant. It is not contended that anything in the particular enumeration does cover machinery. If the tenant's right of removal is to

be restricted, the restriction must be found in the general words: "And all other erections, buildings, improvements, fixtures, and things which are now or which at any time during the said term hereby granted shall be fixed, fastened, or belong to the said messuage and premises, or any part thereof."

Before dealing with those words I wish to point out that the present case seems to be the exact converse of *Haslett* v. *Burt*. (1) In that case the covenant by the tenant was to yield up the premises at the end of the term, "together with all wainscots, windows, shutters . . . . and other things which now are or at any time hereafter shall be thereunto affixed or belonging (looking-glasses and furniture excepted); and together also with all sheds and other erections, buildings, and improvements which shall be erected, built, or made upon the said demised premises, in good repair and condition." There was a particular enumeration followed by general words which were not very unlike the general words in the present case. The Court of Common Pleas held that a plate-glass front, which the lessee had substituted for an old shop window, but without in any manner fastening it (except by means of wedges) to the premises, was at all events a "window" belonging to the demised premises. The Court of Exchequer Chamber were not quite satisfied whether the plate-glass front was a "window" or an "improvement" within the general words, but they held that this did not much matter, for it was clearly one or the other, and was therefore within the covenant and not removable by the tenant.

In the present case this machinery does not come within the particular words of the covenant, and in my opinion it does not come within the general words, even if the doctrine of ejusdem generis is not applied. But I think the present case may well be decided on the basis of *Bishop* v. *Elliott* (2) and *Dumergue* v. *Rumsey*. (3) In both those cases the Court of Exchequer Chamber laid down the ejusdem generis rule in this way—namely, that if you can find that the things described by

(1) 18 C. B. 893. (2) 11 Ex. 113.

(3) 2 H. & C. 777.

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particular words have some common characteristic which constitutes them a genus, you ought to limit the general words which follow them to things of that genus. In the present case all the articles which are described by the particular words have according to the natural meaning of the words the common characteristic of irremovability; and under these circumstances I think the general words should be applied only to articles which possess that characteristic.

But, even apart from that rule, and construing the general words without any limitation, I should in the present case arrive at the same conclusion from a consideration of the general words themselves. Taking the word "erections" alone, I think that (subject to what I shall have to say presently) that word cannot properly be applied to machines which are fastened to the wall or the floor of the building only for their more convenient user. To use the words of Lord Macnaghten in *London and South African Exploration Co.* v. *De Beers Consolidated Mines* (1), speaking of the term "improvements": "That is not the natural or proper meaning of the expression, which seems to be more applicable to something attached to and forming an integral part of the thing improved than to something which is merely added to it or placed upon it without annexation or union." So I think this is not the natural or proper meaning of the term "erections." That word, especially when it is used in immediate collocation with the word "buildings," is not, I think, applicable to machines attached to the floor in the way in which these machines are attached without any idea of adding them to the building. I read the word "improvements" in a similar way. Reliance has been placed on the lessee's covenant not to "erect" on the premises any machinery other than of a specified kind without the consent of the landlord; but I do not think that binds us to give the same meaning to the word "erections" in the general words of the other covenant in the collocation in which we find it. Then, when we come to the word "fixtures," I think that, looking at the covenant as a whole and bearing in mind the proper application of the

(1) [1895] A. C. 451, 455.

doctrine of ejusdem generis, we ought not to hold that removable machinery of this kind comes within it.

It is very desirable that we should lay down such a rule that landlords and tenants may know once for all that when a house is let to a tenant for the purposes of a trade, if the landlord wishes to restrict his tenant's ordinary right to remove trade machinery or fixtures attached to the demised premises, as these machines are, so as to be more conveniently used, and not placed there as an addition or improvement to the premises, the landlord must say so in plain language. If the language used leaves the matter doubtful, the ordinary right of the tenant to remove trade fixtures will not be affected.

ROMER L.J. I have during the argument felt great doubt about this case, and for some time I thought that the appeal ought not to succeed. But upon further consideration I have come to the conclusion that the appellant is right. I have been to a great extent induced to do so by the knowledge we must all have how extremely hard it would be upon a tenant under an ordinary lease to hold that he had lost his ordinary right of removing trade fixtures merely by the use of ordinary general words in the covenant to deliver up the demised premises at the end of his term, unless it can be clearly gathered that the general words were intended to cover trade fixtures. In my opinion the onus lies very strongly upon the landlord to shew clearly that this was the object and intention of the covenant. The decision in *Bishop* v. *Elliott* (1) has proceeded on this principle, and it has stood unquestioned for many years, and we ought not lightly to depart from it. It is very important that the law upon such a subject should as far as possible be definitely settled. It would, I think, be very unfortunate if we had been compelled to distinguish this case from *Bishop* v. *Elliott* (1), and to hold that in the present case the tenant had lost his ordinary right to remove trade fixtures. *Bishop* v. *Elliott* (1) proceeded upon the broad ground that, where in such a covenant in a lease there is a series of words which generally point to and can only be satisfied by applying

(1) 11 Ex. 113.

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them to things which ordinarily as between landlord and tenant would not be removable by the tenant, general words which follow ought to be limited to things of the same kind, and ought not to be treated as including trade fixtures, unless there is clearly manifested an intention that the general words should not be so limited. In the present case I think every word in the particular enumeration may be fairly construed as applying to things which as between landlord and tenant would not ordinarily be removable by the tenant. In my opinion the present case cannot on principle be fairly distinguished from *Bishop* v. *Elliott* (1), and under the circumstances it is far better to treat that case as laying down an intelligible general rule than to attempt to draw nice distinctions which will tend to unsettle the law and render it difficult for people to know what a tenant has to deliver up at the end of his term. In my opinion the appeal should be allowed.

COZENS-HARDY L.J. I am not prepared to dissent from the judgments of my learned brethren, though I am not altogether free from doubt. I think the rule laid down in *Bishop* v. *Elliott* (1) is binding upon us, and I am not disposed to narrow its application. The wording of leases is peculiar, and I doubt whether in any other document than a lease we could have applied the doctrine of *Bishop* v. *Elliott* (1) to the general words which occur in the present case. But on the whole I am not prepared to narrow the rule laid down in *Bishop* v. *Elliott* (1) so as to include this trade machinery in the general words of the covenant.

Solicitors: *Stanley Evans & Co.; Morgan, Upjohn & Leech.*

(1) 11 Ex. 113.

W. L. C.

CARR *v.* ANDERSON.

C. A.
1903
April 6, 7

[1901 C. 2466.]

Felony—Convict's Property—Administrator—Sale of—Bona Fides—Discretion—Action by Convict against his Administrator—Forfeiture Act, 1870 (33 & 34 *Vict. c.* 23), *ss.* 12, 17, 18.

Sect. 12 of the Forfeiture Act, 1870, which gives the administrator of a convict's property "absolute power to sell" any part of that property "as to him shall seem fit," imports that the administrator must exercise discretion and care in case of a sale; and if he does so, then, under s. 17, any contract falling within s. 12 is binding and cannot be in any way impeached by the convict on his discharge.

But if an administrator under the Act is proved to have exercised no discretion or care in the matter of a sale, and a loss thereby ensues to the convict's estate, the Court will hold the administrator personally responsible for the loss.

Decision of Buckley J., [1903] 1 Ch. 90, affirmed.

This was an appeal from the decision of Buckley J. (1) The facts are sufficiently stated in the report below.

Astbury, K.C., and *Montague R. Emanuel*, for the plaintiff. It is submitted, first, that upon the true construction of the Forfeiture Act, 1870 (2), the administrator has no power to sell

(1) [1903] 1 Ch. 90.

(2) By s. 9 the Crown is empowered "to commit the custody and management of the property of any convict" to an administrator.

Sect. 10: "Upon the appointment of any such administrator in manner aforesaid all the real and personal property, including choses in actions, to which the convict named in such appointment was at the time of his conviction, or shall afterwards while he shall continue subject to the operations of this Act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein."

Sect. 12: "The administrator shall have absolute power to let, mortgage, sell, convey, and transfer any part of such property as to him shall seem fit."

Sect. 13: "It shall be lawful for the administrator to pay or cause to be paid out of such property, or the proceeds thereof, all costs and expenses which the convict may have been condemned to pay; and also all costs, charges, and expenses incurred by such convict in and about his defence; and also all such costs, charges, and expenses as the said administrator may incur or be put to in or about the carrying this Act into execution with reference to such property, or with reference to any claims which may be made thereon."

Sect. 14: "The administrator may

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the property of a convict except for the purposes of the Act. Though an absolute power of sale is given to the administrator

cause payment or satisfaction to be made out of such property of any debt or liability of such convict which may be established in due course of law, or may otherwise be proved to his satisfaction, and may also cause any property which may come to his hands to be delivered to any person claiming to be justly entitled thereto, upon the right of such person being established in due course of law, or otherwise to his satisfaction."

Sect. 15: "The administrator may cause to be paid or satisfied out of such property such sum of money by way of satisfaction or compensation for any loss of property or other injury alleged to have been suffered by any person through or by means of any alleged criminal or fraudulent act of such convict, as to him shall seem just, although no proof of such alleged criminal or fraudulent act may have been made in any Court of law or equity; and all claims to any such satisfaction or compensation may be investigated in such manner as the administrator shall think fit, and the decision of the administrator thereon shall be binding: Provided always, that nothing in this Act shall take away or prejudice any right, title, or remedy to which any person alleging himself to have suffered any such loss or injury would have been entitled by law if this Act had not passed."

Sect. 16: "The administrator may cause such payments and allowances for the support or maintenance of any wife or child, or reputed child of such convict, or of any other relative or reputed relative of such convict dependent upon him for support, or for the benefit of the convict himself, if and while he shall be lawfully at large under any licence, as to such administrator shall seem fit, to be made from time to time out of such property, or the income thereof."

Sect. 17: "The several powers hereinbefore given to the said administrator, or any of them, may be exercised by him in such order and course, as to priority of payments or otherwise, as he shall think fit; and all contracts of letting or sale, mortgages, conveyances, or transfers of property, bonâ fide made by the said administrator under the powers of this Act, and all payments or deliveries over of property bonâ fide made by or under the authority of the said administrator for any of the purposes hereinbefore mentioned, shall be binding; and the propriety thereof, and the sufficiency of the grounds on which the said administrator may have exercised his judgment or discretion in respect thereof, shall not be in any manner called in question by such convict, or by any person claiming an interest in such property by virtue of this Act."

By s. 18: "Subject to the powers and provisions hereinbefore contained, all such property and the income thereof shall be preserved and held in trust by the said administrator, and the income thereof may, if and when the said administrator shall think proper, be invested and accumulated in such securities as he shall from time to time think fit, for the use and benefit of the said convict, and his heirs, or legal personal representatives, or of such other persons as may be lawfully entitled thereto, according to the nature thereof; and the same,

by s. 12, that section must be read in conjunction with the other sections of the Act, such as s. 13, which enables the administrator to pay out of the property of the convict the costs of his prosecution; s. 14, which enables him to pay the convict's debts; and s. 15, which enables him to pay compensation for any injury caused by the convict. By s. 9 the "custody and management" of the convict's property is committed to the administrator; and s. 18 shews that, subject to the powers and provisions of the Act, the property is to be "preserved and held in trust" by the administrator for the use and benefit of the convict or his representatives. The administrator is in the position of a trustee, and he has not an unqualified power of sale: he can only sell for the purposes of the Act.

Secondly, if the administrator has power to sell a property, he must sell bonâ fide for the purposes of the Act. Here the defendant has followed the practice of the office at Scotland Yard, which has really no relation to the matter. The person appointed administrator under s. 9 need not be one of the officials of the police. The Crown might appoint any one, e.g., the convict's wife or one of his family. The practice followed by the police authorities is a bad one. Due care is not taken to sell a convict's property at its fair value. In the present case the sale of the railway shares was not a bonâ fide sale. It was not made on the Stock Exchange, but through a money-changer, and was in fact a sham sale and at a great undervalue. The administrator is responsible for the

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and the possession, administration, and management thereof, shall revest in and be restored to such convict upon his ceasing to be subject to the operation of this Act, or in and to his heirs or legal representatives, or such other persons as may be lawfully entitled thereto . . . ."

Sect. 20: "The costs as between solicitor and client of every action or suit which may be brought against the said administrator with reference to any such property as aforesaid, whether during the time while the same shall be and continue vested in him under this Act or after the same shall cease to be so vested, and all charges and expenses properly incurred by him with reference thereto, shall be a first charge upon and shall be paid out of such property, unless the Court before which such action is tried or such suit is heard shall think fit otherwise to order."

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dishonesty of the subordinate who connived at and arranged that sham sale.

Birrell, K.C., and *Methold*, for the defendants, were not called upon.

COLLINS M.R. I am of opinion that the decision of Buckley J. was perfectly right. He had an opportunity of hearing and seeing Sir Robert Anderson, and he has come to the conclusion that what Sir Robert Anderson did he did with perfect bona fides. He has carefully considered the different allegations made, and he has discussed the question of the jewellery, which gave probably more ground for discussion than the other part of the case; but he has come to the conclusion with reference to it that, there being a well-known practice in the office—a practice known to Sir Robert Anderson—the fact that he did not interfere to stop it was really an exercise of his discretion that the ordinary course should be adopted in that case; and it seems to me not unreasonable that that should be the primâ facie course to be taken with reference to such things as jewellery found in the possession of a convicted person. I think that the mere fact that Sir Robert Anderson did not intervene does not negative exercise of discretion. He knew the practice and thought it a reasonable one, and allowed it to be followed out in this particular case.

With respect to the railway shares, I agree with all that Buckley J. has said, and I think it would be a waste of time to repeat the grounds for his conclusion, which are my grounds as well as those of the learned judge.

I think this appeal must be dismissed, and with costs.

ROMER L.J. I agree; and I only add that with regard to the jewellery I am satisfied that Sir Robert Anderson did know of the sale, and that in a sense he directed it and exercised a certain amount of discretion in the matter.

I should like to add this to what Buckley J. has said. It is alleged that there is a practice at Scotland Yard by which all convicts' property is sold, without regard to whether it is desirable in the interests of those entitled to the property that

such sale should take place or not. All I can say is that if there be such a practice it is an improper one, and the sooner it is departed from the better. And I further say that if any administrator is proved to have taken no pains whatever with regard to a sale, to have exercised no discretion in the matter of the sale, but to have allowed some one in the office to cause a sale of a part of a convict's property without any real discretion being exercised on the part of the administrator, and a loss thereby ensues to the convict's estate, that administrator will probably find that he will be made responsible in this Court for the loss.

COZENS-HARDY L.J. I agree. The question seems to me really to turn upon ss. 12 and 17 of the Act. Sect. 12 gives the administrator "absolute power . . . . to sell . . . . any part of such property as to him shall seem fit." That seems to me to import that he must exercise some discretion and take some care in the matter; but as long as he does that the provisions of s. 17 apply, and any contract of sale falling within s. 12 is binding and cannot be in any way impeached by the convict when he is discharged. Sect. 18 merely provides that when the convict is released the administrator shall hand over to him any property remaining undisposed of, and any investments or money representing property disposed of.

As to the railway shares, I do not think it necessary to add anything to what has been said by Buckley J. It is to my mind quite plain that Sir Robert Anderson did authorize the sale, that he was entitled to say, as against the man who represented that he had sold on the Stock Exchange, that there was a sale, that the purchase-money was received, that the sale was perfectly bonâ fide, and that there was no ground for questioning it.

Solicitors: *Emanuel, Round & Nathan; Wontner & Sons.*

G. I. F. C.

C. A.
1903
FARWELL J.
April 3.
C. A.
May 27.

In re YORKSHIRE WOOLCOMBERS ASSOCIATION, LIMITED.
HOULDSWORTH *v.* YORKSHIRE WOOLCOMBERS ASSOCIATION, LIMITED.

[1902 Y. 806.]

Company—Mortgage—Assignment of Present and Future Book Debts—Floating Charge—Debenture-holders — Priority—Registration of Mortgages—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 14, *sub-s.* 1 (*d*).

In October, 1902, a company, having to give security to certain guarantors, by deed assigned all its present and future book and other debts, with the benefit of all securities for the same, to a trustee, subject to redemption, in trust for the guarantors. The deed contained no express provision against possession being taken by the trustee, but contained a declaration that the trustee should at any time, if required by the guarantors, give notice of this assignment to the debtors of the company, with a proviso that it should not be incumbent on the trustee to give notice; there were also provisions that the trustee might at any time give notice, appoint a receiver, and exercise the statutory power of sale, but meantime he was not to be answerable for allowing the company to receive the book debts. A receiver having been subsequently appointed in a debenture-holder's action, the trustee now applied by motion in that action to enforce his security:—

Held (affirming the decision of Farwell J.), on the construction of the deed of October, 1902, that it was not intended by this assignment to stop the company, but that it was intended to allow it to go on receiving the book debts for the purpose of carrying on its business, and accordingly that the deed contained the true elements of a floating charge, and was therefore void for want of registration under s. 14, sub-s. 1, of the Companies Act, 1900, and had no validity against the receiver appointed in the debenture-holder's action.

Per Romer L.J.: A mortgage or charge by a company which contains the three following characteristics is a "floating charge" within the meaning of s. 14, sub-s. 1 (*d*): (1.) If it is a charge on a class of assets both present and future. (2.) If that class is one which in the ordinary course of the business of the company would be changing from time to time. (3.) If it is contemplated by the charge that, until some future step is taken by or on behalf of the mortgagee, the company may carry on its business in the ordinary way so far as concerns the particular class of assets charged.

APPEAL from a decision of Farwell J.

This was an application in a debenture-holder's action by the

trustee of a mortgage of October 25, 1902, to enforce his security, which raised the question whether a mortgage of book debts as carried out by this deed was a specific mortgage on the debts of the association, or a "floating charge" on the undertaking or property of the company which required registration under s. 14, sub-s. 1 (*d*), of the Companies Act, 1900. The facts, so far as material for the purposes of this report, were as follows:—

By a trust deed of April 23, 1900, the Yorkshire Woolcombers Association, Limited, specifically mortgaged all its freehold and leasehold properties to trustees to secure its debenture stock, and, as beneficial owner, charged in favour of the trustees "by way of floating security all its other property and assets both present and future, and its undertaking, but not including capital for the time being uncalled." This deed contained (clause 21) the usual power enabling the association until the crystallization of the security "to sell or specifically mortgage or charge, or otherwise deal with and dispose of, the property and assets expressed to be charged by way of floating security, or any part thereof, and to divide profits among the members of the company in as unfettered a manner as if these presents had not been executed."

During the years 1901 and 1902 certain guarantees to the amount of 59,000*l.* had been given by the directors of the association and others to the Bradford District Bank, Limited, the bankers of the association, to secure an overdraft, and prior to the execution of the mortgage of October 25, 1902, the guarantors had been pressing the association to discharge its indebtedness to the bank and relieve them from liability under their guarantees; but the association being unable so to do gave to the guarantors the security it was now sought to enforce.

The indenture of October 25, 1902, was made between the association of the first part, Frederick Illingworth (the trustee) of the second part, and the said Frederick Illingworth and his co-guarantors of the third part. After reciting that the association had overdrawn their banking account to a considerable extent, and would from time to time require advances and

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accommodation from the said bank; that the guarantors had requested the association to discharge them from their liability under their respective guarantees, but the association had requested the guarantors not to take any immediate steps with the view to obtaining the discharge thereof, "and the guarantors have agreed so to do on having such indemnity and specific security as hereinafter appearing," the association covenanted to indemnify the guarantors as therein mentioned. The association as beneficial owners then assigned to F. Illingworth, his executors, administrators, and assigns, "all and singular the book and other debts now owing to the association, and also all and singular the book and other debts which may at any time during the continuance of this security become owing to the association (but not including uncalled capital of the association), and the full benefit of all the securities for the said present and future book and other debts"—to hold the same unto the said F. Illingworth, his executors, administrators, and assigns, in trust for the guarantors in proportion to the amount of their respective liabilities, subject to redemption on discharge of the guarantors from all liability on account of their respective guarantees. The deed contained no express provision as to refraining from taking possession; but it contained a declaration that Frederick Illingworth, or other the trustee or trustees for the time being, should "at any time or times, if requested in writing by the guarantors or the majority in number of the guarantors, forthwith give notice of these presents to the debtors of the association for the time being," with a proviso that it should "not be incumbent on the said trustees or trustee to give any notice to any of the present or future debtors of the association of these presents, or to enforce any of the said debts, or to take any steps or proceedings for that purpose unless requested as aforesaid by the guarantors" to give notice, "or unless the said trustees or trustee shall think fit to give such notice, and the said trustees or trustee shall not in the absence of any such request be answerable or responsible for any loss occasioned by any delay or omission in any such respect." The trustees or trustee were also empowered at any time, if he or they should think fit, to give notice to all

or any of the present or future debtors of the association of this present assignment, and, at their discretion, to receive such debts or appoint a receiver of them, and that the statutory power of sale should be exercisable at any time by the trustees without further notice; there was also a declaration that the said trustees or trustee should not, nor should the guarantors respectively or their respective heirs, executors, or administrators, or any of them, "be answerable for, or in anywise chargeable on account of, permitting or authorizing the association to receive all or any such debts, or to deal with the same or the proceeds as if they were not subject to the mortgage hereby created." At the date of the execution of this mortgage these book debts formed a very considerable portion of the assets of the association and amounted to about 71,000*l.*

On November 21, 1902, F. Illingworth by deed appointed a receiver of all the book and other debts assigned to him by the said mortgage, and notice of the said mortgage and of the appointment of receiver was forthwith sent to the debtors of the association.

On November 25, 1902, a receiver was appointed by the Court in this action on behalf of the debenture stockholders. By an arrangement between the two receivers, all moneys received in payment of outstanding debts were paid to a joint account in the Bradford District Bank, Limited, in the joint names of the two receivers; a sum of over 55,000*l.* was standing to the credit of this joint account.

F. Illingworth now applied by motion in the debenture-holder's action for an order directing the receiver in the action to concur with the applicant's receiver in paying over to the applicant as trustee of the mortgage deed, or to the applicant's receiver, all moneys now standing to this joint account, and for an order giving liberty to the applicant or his receiver to collect and get in any other outstanding debts.

The motion was heard by Farwell J. on April 3, 1903.

Bramwell Davis, K.C., and *Hewitt*, for F. Illingworth.

Upjohn, K.C., and *Montgomery*, for the plaintiffs in the action.

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FARWELL J., after referring to paragraph 21 of the debenture trust deed of April 23, 1900, and stating the material portions of the mortgage of October 25, 1902, continued:—Now it is quite plain on the construction of the deed itself, that it was not intended to stop the company; the company was clearly intended to go on. These book debts are a considerable portion of the assets of the company, and at the date of the deed amounted to 71,000*l*. If the assignment is to be treated as a specific mortgage or charge or disposition, then the company had no business to receive one single book debt after the date of it; but if, on the other hand, although not so called, the company was intended to go on receiving the book debts and to use them for the purpose of carrying on its business, then it contains the true elements of a floating security. It is of the essence of a charge of that kind that it remains dormant until the person in whose favour the charge is created intervenes. That appears to me to be the exact definition of the present assignment. The case of *Tailby* v. *Official Receiver* (1) is singularly like the present one; in that case Lord Macnaghten, dealing with a deed by which a trader assigned all and singular "the stock-in-trade and effects which during the continuance of the security might be on the mortgagor's then premises . . . . all the book debts due and owing, or which may during the continuance of this security become due and owing to the said mortgagor," and so on, said: "I pause for a moment to point out the nature and effect of the security created by the bill of sale of 1879. It belongs to a class of securities of which perhaps the most familiar example is to be found in the debentures of trading companies. It is a floating security reaching over all the trade assets of the mortgagor for the time being, and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes. In other words, the mortgagor makes himself trustee of his business for the purpose of the security. But the trust is to remain dormant until the mortgagee calls it into operation." Reading "book debts" for "trade assets" in that case, the sentence is exactly applicable to the case before me.

(1) (1888) 13 App. Cas. 523, 541.

In my opinion this is, although the parties have chosen to call it a specific security, nothing more nor less than a floating security. But when one comes to consider what "specific security" means, in my opinion it is quite clear that anything which may take effect as a floating security is wholly inconsistent with, and is the antithesis of, a specific security. A specific security is that which is given on specific property. A charge on all book debts which may now be, or at any time hereafter become charged or assigned, leaving the mortgagor or assignor free to deal with them as he pleases until the mortgagee or assignee intervenes, is not a specific charge, and cannot be. The very essence of a specific charge is that the assignee takes possession, and is the person entitled to receive the book debts at once. So long as he licenses the mortgagor to go on receiving the book debts and carry on the business, it is within the exact definition of a floating security.

On the ground, therefore, that the 21st clause of the debenture trust deed does not authorize the creation of a floating security in priority to the floating security created by that deed, and also on the ground that it is void for want of registration under the 14th section of the Companies Act, 1900, I hold that this charge is of no validity as against the receiver appointed by the debenture-holders under that first deed.

The motion fails, and must be dismissed with costs.

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From this decision F. Illingworth appealed. The appeal was heard on May 27, 1903.

Neville, K.C., and *Hewitt*, for the appellant. The mortgage of October 25, 1902, is a specific assignment of a definite portion of the assets of the association; it is not a charge upon the undertaking as described in *In re Panama, New Zealand and Australian Royal Mail Co.* (1), where a floating charge is first defined. This mortgage does not fall within any of the conditions of a floating charge as described in

(1) (1870) L. R. 5 Ch. 318, 322.

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In re Florence Land and Public Works Co. (1) and *In re Colonial Trusts Corporation.* (2)

[ROMER L.J. "Floating charge" has no legal meaning: has it ever been used in any previous Act of Parliament?]

The Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), s. 3, is the only instance. The essence of a floating security is that it is dormant until the mortgagee calls it into operation: *Tailby* v. *Official Receiver* (3); *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (4) That is not the case with this deed: it is an absolute and immediate assignment of a particular class of assets, not of the whole undertaking. It is a specific charge on the book debts, present and future; it is not necessary to confine the charge to book debts existing at the time. The charge is sufficiently defined and passes the equitable interest in book debts incurred after the assignment: *Tailby* v. *Official Receiver.* (5) A specific charge on present and future debts is frequently given: Palmer's Company Precedents, 8th ed. Pt. I. p. 1084, form 598. There is nothing in the mortgage which says the association is to be entitled to deal with these book debts as if there had been no mortgage until the mortgagee intervenes; there is nothing which in terms gives the mortgagee a right to intervene on any specified default, or on failure to comply with any specified demand.

[VAUGHAN WILLIAMS L.J. Is there anything in the deed to prevent the association from dealing with the book debts as they are paid off?]

There is no express prohibition; there is only the absolute assignment. The mortgagee can give notice at any moment to any of the debtors not to pay the association; therefore an express prohibition is not necessary. The mortgage is, therefore, a valid and specific charge on a particular and properly defined class of the assets of the association, and ought to have priority over the debenture trust deed.

Upjohn, K.C., and *Montgomery*, for the respondents. On

(1) (1878) 10 Ch. D. 530.
(2) (1879) 15 Ch. D. 465.
(3) 13 App. Cas. 541.
(4) [1897] A. C. 81.
(5) 13 App. Cas. 523.

the true construction of this deed it is quite clear the company was intended to go on with its business, and should be allowed to receive these book debts. Taking the dictum of Lord Macnaghten in *Tailby* v. *Official Receiver* (1), you have only to read "book debts" for "trade assets," and the sentence exactly covers this case.

Neville, K.C., in reply.

VAUGHAN WILLIAMS L.J. In this case we have to determine what is the meaning of the words "floating charge on the undertaking or property of the company" in clause (*d*) of s. 14, sub-s. 1, of the Companies Act, 1900. It is unfortunate, I think, that in an Act of Parliament such a term as "floating charge" should have been used without some definition in the definition clause as to what is the meaning of the words "floating charge on the undertaking or property of the company," as employed in this section of this Act of Parliament. Unfortunately the words "floating charge," although they have been frequently used in legal documents and in judgments of the Courts, have never been defined with any great degree of accuracy. It is true that one can find definitions like that given by Lord Macnaghten in *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (2), which is: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default." It will be seen, therefore, by that definition that even Lord Macnaghten, who is remarkable for his accuracy of language, cannot succeed in defining a floating security without using some terms which are not really applicable to the subject-matter, but are only applicable by way of analogy.

(1) 13 App. Cas. 541. (2) [1897] A. C. 86.

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He talks of the charge as being "dormant." You want a definition of when and under what circumstances a charge is properly spoken of as "dormant"; but still, I shall take that as the definition for the purpose of the present case, and try and see how far the particular security in this case does or does not come within the definition of a floating security or a floating charge.

Before I apply that test, I wish to say that I am a little reluctant to treat this security as coming within the phrase "floating security," because I do not think that it is to the interests of commercial people engaged in commercial transactions that a deed like the present, which came into existence for a purpose like that which brought this deed into existence, should be treated as being a floating security. I cannot help thinking that, apart from the requirement of s. 14 of the Act of 1900 as to the registration of a floating charge, to treat this deed as creating a security upon the same level as the floating charge which is ordinarily created in favour of debenture-holders would be to do that which would interfere seriously with the advantage of commercial people dealing in commercial transactions, because it is plain that when you start with your floating security given to the debenture-holders, the whole basis of that arrangement is that the business is going on, and should go on, until the debenture-holders, according to the terms of the deed, intervene. Therefore, that being primâ facie the object of this floating charge, everything that will facilitate the carrying on of the business in question without interfering with the floating charge ought to be treated as a transaction which may properly be entered into by the company. [After some further observations upon the obvious benefit to the debenture-holders and all other parties concerned in the present case, if an effective arrangement could have been made with the guarantors and the bank to enable the association to continue its business, his Lordship continued:—]

I do not think I have any right in construing this deed to take any matters of this kind into consideration; I have only to ask myself here what is the nature of the security which is

given. It is suggested, not only that this is not a floating security, but that it is a specific security. I cannot agree. [The learned Lord Justice read the paragraph of Farwell J.'s judgment, *ad fin.*, ante, p. 289: "In my opinion . . . . definition of a floating security."] Now I agree with what was said on behalf of the appellants, that when you come to look at this deed there is to be found no passage in it which specifically says that the mortgagor shall be entitled to deal with these book debts as if there had been no mortgage until the mortgagees intervene. I agree, further, that not only is there no clause to that effect, but there is no clause which in terms gives them a right to intervene upon any specified default, or after failure to comply with any specified demand. The case is obviously different from that which is contemplated by Lord Macnaghten when he spoke of the right to intervene given to the mortgagee on default of the mortgagor. But still, although I do not find that, I do find, when I take the deed as a whole, clauses and arrangements which, to my mind, are wholly consistent with it having been the intention of both parties here that the association should be licensed to deal with these book debts as they come into existence, just as if there had been no mortgage at all, unless and until the mortgagee thought fit to intervene. Then when the mortgagees are given by this deed, not the right to intervene upon any particular default happening, but to intervene when they choose, still if they do intervene that does not give them the right to complain of any appropriation of these book debts in the meantime for purposes other than their security. There is a passage which has been read several times in the course of the argument: "that the said trustee or trustees shall not, nor shall the guarantors respectively or their respective heirs, executors or administrators, or any of them, be answerable for or in anywise chargeable on account of permitting or authorizing the association to receive all or any such debts, or to deal with the same or the proceeds thereof as if they were not subject to the mortgage hereby created." It is quite plain to my mind that there is a licence intended to be given to the association to employ these book debts for any

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purpose it likes unless and until the mortgagees intervene, and when the mortgagees have so intervened nobody is to be held responsible for any appropriation of these book debts to purposes other than those contemplated by the deed, which has taken place prior to the intervention. There was a good deal of discussion in the course of the argument as to what really is a "specific security." I do not think that for a "specific security" you need have a security of a subject-matter which is then in existence. I mean by "then" at the time of the execution of the security; but what you do require to make a specific security is that the security whenever it has once come into existence, and been identified or appropriated as a security, shall never thereafter at the will of the mortgagor cease to be a security. If at the will of the mortgagor he can dispose of it and prevent its being any longer a security, although something else may be substituted more or less for it, that is not a "specific security." I asked Mr. Neville whether the result of this deed was not that, so far as the terms of it were concerned, there was nothing to prevent the mortgagors—the association—from dealing with book debts that had already been paid in, so as to prevent them being any longer part of the Illingworth security, and he in fact said, "No, there was not." At the moment when it was paid in they got the advantage, because it discharged the debt on which they were guarantors, but it admittedly was competent for the mortgagors the next day not only to draw out an equivalent sum to that which had been paid in, but even to draw out a larger sum.

Under these circumstances I think that the judgment of Farwell J. was right, and that this appeal must be dismissed.

ROMER L.J. I also think that this appeal fails. Under s. 14 of the Companies Act of 1900, for a charge to be a "floating charge on the undertaking or property of the company" within the meaning of the words used in that section, it cannot, I think, be properly contended that it is essential that the charge must be on the whole undertaking, or on the whole property, of the company. The term "floating" is one that until recently was a mere popular term. It certainly had no distinct

legal meaning. It is not a legal term. It has recently been used in more than one statute; but when the Courts have to consider whether the charge is a floating one within the meaning of the term as used in the Acts of Parliament, and in particular within the meaning of the Companies Act, 1900, one must, I think, deal with the question of substance to be answered according to the circumstance of each particular case. I certainly do not intend to attempt to give an exact definition of the term "floating charge," nor am I prepared to say that there will not be a floating charge within the meaning of the Act, which does not contain all the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1.) If it is a charge on a class of assets of a company present and future; (2.) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3.) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.

In the present case those three characteristics do in my opinion distinguish the charge we have to consider. In the first place, the charge is one upon all the debts of the company present and future, not even limiting them (though I do not think it makes any difference) to the trade debts, present and future. In the second place, it obviously contemplates a class of asset which, in the ordinary course of the life of the company, must continually, and of necessity, change; and, thirdly, in the present case, if I look at the deed which created the charge here, to my mind it is clearly contemplated that until some step is taken by or on behalf of those who are to have the benefit of the charge, the company would be able to receive the debts due to the company in its ordinary course of business, and to deal with them for the ordinary purposes of the business. In the first place, in considering that question, it is important to consider that a charge of debts is not completed until notice is

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given to the debtors, and you find by this deed that by express provision it is contemplated that the trustees need not, unless they choose, give notice at all to the debtors, and more than that, there is an express provision that they cannot be compelled to do so, unless they have a request from those entitled to the charge—that is, the guarantors, or a majority of them. Then there is that further provision, to which my Lord has referred, that the trustees are not to be answerable for allowing the association to receive their debts, which I need not repeat. Treating this as a commercial document—as it is—what was the meaning of it? Did it not contemplate that until the trustees thought it necessary to intervene, the charge should not be perfected by notice being given to the debtors, and that the business should be carried on in the ordinary way in regard to these debts, and that a debtor might go and pay to the company a particular debt, and the company might receive it, and deal with the cash in the ordinary way in which it would be dealt with in the ordinary course of business? I think that certainly is what is contemplated by this deed, and, indeed, to hold otherwise would be to defeat, to my mind, the whole object and intent of the document, for if the trustees had been compelled or obliged to give notice to all the debtors of this company so as to perfect their security, what would have been the result? Why, the business of the company must have been stopped. When I look at the terms of this deed, and when I see what class of assets it is dealing with, I cannot but come to the conclusion that it was contemplated by this deed that until notice was given by the trustees, until some further steps were taken, these debts were intended to remain in the disposition, in the ordinary course of business, of the company —in other words, within the meaning of the phrase as used in s. 14 of the Companies Act, 1900. I also agree with Farwell J. that it cannot be properly called a specific mortgage or charge within the meaning of that phrase as used in the trust deed which secured the debenture stock. I think that the decision of the Court below was quite right, and that the appeal should be dismissed.

COZENS-HARDY L.J. I agree. It seems to me that Farwell J. was quite right in holding that this security was a floating charge on the undertaking or property of the company. In construing this deed, we are of course entitled and bound, to a certain extent, to look at the surrounding circumstances. The mortgagor—the association—is a company carrying on a very large business, and having a large number of book debts and stock-in-trade, and having bankers with whom there was an overdrawn account. Under these circumstances, what do we find? We find that the bankers have required guarantees from some of the directors and others. Those guarantees had been given, and then in that state of things a security was executed which contained, in addition to the clauses which have been referred to by my Lord and Romer L.J., certain recitals which I think greatly assist the conclusion at which we have arrived. The first recital says that the association has kept an account with the Bradford District Bank, Limited, and have overdrawn such account for a considerable amount, and will from time to time require advances and accommodations from the said bank. Clearly contemplating that the company would continue its business and continue its business with the bank in the ordinary way in which a company of this kind does. Then the last recital says this: "And whereas the guarantors have requested the association to discharge them from their liability under such guarantees, but the association has requested the guarantors not to take any immediate steps with the view to obtaining the discharge thereof, and the guarantors have agreed so to do on having such indemnity and specific security as hereinafter appearing"—that is to say, the guarantors agreed not to take steps which would be fatal to a continuance of the business of the company, but they agreed to do that which would necessarily involve the continuance of the business, and probably require further advances and accommodation from the bank. Now under these circumstances it seems to me impossible to doubt that it was in contemplation, and it was the intention of the parties, that the association were to have the right to receive the book debts and to deal with them for the purposes of the business, unless and until the mortgagees

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thought fit to intervene. In other words, the security must be read as containing a licence or permission by the mortgagee to the association to deal with the mortgage property for a certain time as though a mortgage had not been executed. Now that being so, without an attempt to define accurately the meaning of the words "floating charge," it seems to me that we have at least enough to shew that we have a good floating charge. It was somewhat faintly contended by Mr. Neville that there could be no floating charge unless it was a charge upon all the undertaking or property of the company. That is a contention which at least it is very difficult to apply to this section, because the language of the section is, "a floating charge on the undertaking or property of the company," and I think it would be dangerous in the last degree to hold that there can be no floating charge within the meaning of this Act, unless it includes all the property of the company, or all the movable property, or any particular combination of the assets of the company. My view is that the floating charge need not be on the whole undertaking nor on the whole property of the company. It must, I think, embrace both present and future property, and property of a particular class. It must, I think, contain expressly or by necessary implication a right to the company to deal with it for a certain time as though the charge had never been executed. When these conditions are found, I think you have a floating charge within the meaning of the Act. Those conditions I find here, and I think Farwell J. was quite right and that the appeal must be dismissed.

Solicitors: *Leslie & Hardy, for Frank Taylor, Bradford; George Trenam, for Addleshaw, Warburton & Co., Manchester.*

W. C. D.

C. A.
1903
May 4.

In re COBBOLD.
COBBOLD *v.* LAWTON.

[1902 C. 1751.]

Will—Construction—Gift to A. for Life, with Remainder to Children—Gift over—Vested Interest—"Die without leaving Children"—Death of Child in Lifetime of Tenant for Life—Existence of Child known to Testator—"Leaving"—"Having had."

It is a now well-settled principle that, where there is a gift by will to A. for life, and after his death to his children in terms which give the children an absolute interest in A.'s lifetime, followed by a gift over "if A. dies without leaving children," the word "leaving" is so to be construed as not to destroy any prior vested interest: that is to say, "without leaving children" should be read as "without leaving children who have not attained vested interests"; and this principle of construction is not affected by the circumstance that the testator knew of the existence of a child of A. and that such knowledge appears on the face of the will itself.

A testatrix, after giving a legacy for the benefit of G. L. the younger, son of her nephew G. L. the elder, gave her residuary estate to trustees upon trust for conversion, and out of the proceeds to raise and invest a sum of 1000*l.* and pay the interest thereof to the said G. L. the elder for life, and after his death to divide the capital amongst his children equally; and in case of his death "without leaving any child or children," the same to fall into her residuary estate, which she gave to certain nieces equally.

G. L. the elder survived the testatrix and died having had five children all born before the date of the will, of whom four died in infancy before that date. The fifth, G. L. the younger, named in the will, survived the testatrix and died in his father's lifetime:—

Held (reversing Byrne J.), that G. L. the younger took an absolute vested interest at birth, which interest became, upon his death, transmissible to his representatives.

MARY ANN COBBOLD, spinster, by her will, dated February 11, 1854, after appointing executors and trustees and making sundry bequests (including a bequest of 250*l.* for the benefit of George Lawton, therein described as the son of the testatrix's nephew George Lawton), devised and bequeathed her real and residuary personal estate to her trustees upon trust for conversion, and out of the proceeds to raise the several sums therein mentioned (including the sum of 4000*l.* next hereinafter

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mentioned); and as to the said sum of 4000*l.* upon trust to invest the same as therein mentioned, and to pay the interest of 1000*l.*, part thereof, to each of her nephews George Lawton, and three others therein named, for his life without power of anticipation; and from and after the decease of each of her nephews, or in the event of the death of any one of them in her lifetime, or in case of any one of them attempting to dispose of the said interest, she directed her said trustees to stand possessed of the said principal sum of 1000*l.* to the interest of which such nephew was entitled for life as aforesaid "upon trust for and to pay and divide the same between and amongst the children of my said nephew so dying or attempting to dispose of the said interest moneys, share and share alike; if but one the whole to be in trust for that one or only child; and in case any of my said last-mentioned four nephews shall depart this life without leaving any child or children, then I direct that the said principal sum or sums, as the case may be, shall fall into and form part of my residuary personal estate hereinafter mentioned, and be disposed of accordingly." And the testatrix gave her residuary estate (real and personal) to her said trustees in trust for her three nieces therein named equally.

By a codicil dated May 30, 1857, the testatrix revoked the bequest in her will of 250*l.* for the benefit of her great-nephew George Lawton, and gave 100*l.*, part thereof, to his father.

The testatrix died on June 26, 1857.

The 1000*l.* to the income of which the testatrix's nephew, George Lawton the elder, was entitled as aforesaid, was now represented by the sum of 970*l.* invested on a freehold mortgage at 4 per cent.

George Lawton the elder survived the testatrix and died on January 1, 1902, having had five children only, including George Lawton the younger, the above-named grand-nephew of the testatrix. Of these five children, all of whom were born before the date of the will, four died in infancy before that date. The fifth, George Lawton the younger, survived the testatrix, and attained twenty-one after her death. He died intestate on July 7, 1884, in his father's lifetime, leaving a widow and three

children. He left no property other than his interest (if any) under the will of the testatrix, and therefore no administration was taken out to his estate.

An originating summons was taken out by the acting trustee of the will of the testatrix against her three nieces, or their representatives, as residuary legatees, and against the widow of George Lawton the younger, to have the question of construction determined whether, upon the death of George Lawton the elder, the 1000*l.* of which he had been tenant for life fell into the residuary personal estate of the testatrix, or whether it formed part of the estate of his deceased son George Lawton the younger, as his only child who was living at the date of the will and survived the testatrix; and asking for consequential relief.

The summons was heard by Byrne J., who held that the fund fell into the residuary personal estate, and made an order accordingly.

The defendant, the widow of George Lawton the younger, and who had been appointed by the order to represent his estate, appealed.

R. J. Parker, for the appellant. The question is what is the meaning to be given to the words of the gift over, "without leaving any child or children." I submit it means without having had any child or children who had not attained a vested interest or vested interests under the preceding gift. Under that gift the children of George Lawton took vested interests at birth, and the words "without leaving" should not be construed as divesting that prior vested interest. The general principle applicable to this case has been thus stated: If there is a gift to A. for life with a gift after his death to his children to be paid or vested at twenty-one, or to the children without more, so that they take vested interests at birth, a gift over, if A. dies without leaving children, will be construed as equivalent to "without having had children" or "without having had children who attain vested interests," as the case may require: Theobald on Wills, 5th ed. p. 617. That principle, which is applicable to both real and personal estate, must now be taken as settled by the authorities, commencing with

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Marshall v. *Hill* (1), and including the leading case of *Maitland* v. *Chalie* (2), *In re Thompson's Trust* (3), and *White* v. *Hill*. (4) The rule is not confined to a case in which the tenant for life stands in loco parentis to the legatee in remainder, but extends to a case in which the tenant for life is a complete stranger, as in *Casamajor* v. *Strode*. (5) The foundation of the principle as established by the cases is to preserve an already vested interest—not to provide for the family of the tenant for life. No doubt, the principle is never applied where it is clear upon the will that the word "leaving" must bear its literal meaning. Here the testatrix knew that her nephew had a child, and it is impossible to suppose she was contemplating the death of the child in his father's lifetime.

The only reported case in which the present point seems to have been open for discussion—namely, what is the effect of a testator's knowledge of the existence of a child—is *In re Brown's Trust* (6), where, as here, there was a child living at the date of the will and the testator knew it; but the point was not actually raised or argued.

Archibald Brown, for the defendants, the residuary legatees. In this case Byrne J. followed his own decision in a previous case of *In re Robinson, Scott* v. *Evans* (7), where the testator did not know of the existence of a child at the date of the will. This is a stronger case, for the testatrix did know of the existence of a child, and yet she chose to use the words "without leaving." I do not dispute the principle, but I submit this case is not one of a clear previously vested interest. The whole context shews that "leaving" ought to be construed literally. The contingency of a child surviving the tenant for life is part of the gift itself and cannot be disregarded: *In re Watson's Trusts*. (8)

[COZENS-HARDY L.J. referred to the judgment of Amphlett B. in *Treharne* v. *Layton* (9)]

(1) (1814) 2 M. & S. 608; 15 R. R. 367.
(2) (1822) 6 Madd. 243; 23 R. R. 209.
(3) (1852) 5 De G. & Sm. 667.
(4) (1867) L. R. 4 Eq. 265.
(5) (1843) 8 Jur. 14.
(6) (1873) L. R. 16 Eq. 239.
(7) March 21, 1902. Not reported.
(8) (1870) L. R. 10 Eq. 36.
(9) (1875) L. R. 10 Q. B. 459, 463.

VAUGHAN WILLIAMS L.J. In my opinion this appeal succeeds.

Byrne J. decided the case on the ground that it appeared, upon the face of the will, that the testatrix knew that this particular nephew had had a son, and that that son was, at the date of the will, still alive. And if, when one considers the question as to what construction is to be given to the words here, "without leaving any child or children," one could only, in departing from the primâ facie meaning of those words, put upon them the meaning "without having had any child or children," then I should feel the reasoning of Byrne J. to be irresistible. But, in my judgment, if one refuses to put upon the words "without leaving any child or children" their natural meaning, one is not bound, as the only possible alternative, to read those words as meaning "without having had any child or children." It appears to me that the principle which really governs the question whether one ought to depart from the primâ facie meaning is correctly stated in the two judgments of Cleasby B. and Amphlett B. in *Treharne* v. *Layton* (1), which was the decision of the Exchequer Chamber. I will quote from the judgment of Amphlett B. first, because in his case the observation that he made is not a quotation in any way, but is the expression of his own judgment. What he says is this (2): "The counsel for the defendants has been unable to adduce a single case at variance with the uniform current of decisions which established the principle, that where a gift to the children is a vested gift it will not become divested by the use of the words, 'in case the parent dies without leaving issue.'"

Now, if the principle is there properly stated, there is an end of this case, because the argument founded on the words "without leaving" as meaning "without having had," coupled with the knowledge of the testatrix of there having been a child, cannot arise. But I wish to point out that Cleasby B. in his judgment states the same proposition, though in the form of a quotation from the judgment of Parker V.-C. in *In re Thompson's Trust* (3), where the Vice-Chancellor says

(1) L. R. 10 Q. B. 459. (2) L. R. 10 Q. B. 463. (3) 5 De G. & Sm. 667, 670.

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this: "The will gives a life estate, and then clearly a vested interest to the children; and if any child dies under twenty-one leaving issue, to the issue of that child. Thus far, everything vested; and then occurs the clause, 'in case the said Martha Oliver shall leave no child or children, or leaving such, all of them shall happen to die under age and without issue,' in which case he gives the fund over. It is said, that, if the word 'leave' be understood in its ordinary sense, the gift over takes effect; for Martha Oliver had no children who survived her. It appears to me that the testator's intention was to give this fund over only in case the previous limitation should fail." Then Cleasby B. goes on to say that the Vice-Chancellor "adds this remark, which is so just and applicable to all cases of this description: 'But I may observe, an observation that may always be made in cases where there is this kind of question, that the testator never contemplated the event which has happened, of a child attaining twenty-one years and dying in the lifetime of the tenant for life. He assumed the child would have lived.' And then he says: 'I think that the construction is clear according to the authorities.'" In my opinion, therefore, under the circumstances of this case the judgment of Byrne J. cannot stand, and there must be a declaration that the 1000*l.* became vested indefeasibly in George Lawton the younger and is payable to his legal personal representative.

ROMER L.J. I am of the same opinion.

If you have a gift by will to A. for life, and after A.'s death to his children in terms which would give them an absolute interest in A.'s lifetime, and then you have a gift over simply in these terms, "if A. dies without leaving children," you are to construe the expression "leaving" so as not to destroy any prior vested interest. In other words, you construe it as meaning "without leaving a child who has not attained a vested interest." That must now be treated as well settled. Now does it necessarily make a difference that the testator himself knew of the existence of a child, and that his knowledge appears on the face of the will? In my opinion it does not. It is clear that the testator in such a case cannot have con-

templated a gift over in case of A. dying without having had any children, because he knew A. had a child, but he may well have contemplated a gift over in case of A. dying without having any child who attained a vested interest. It is a pity to trench upon a well-settled principle. Upon the terms of this will it is clear to my mind that the gift to the children of the nephew is not a gift to children who shall survive the tenant for life. It gives an interest to children immediately on birth—on their coming into being during the lifetime of the tenant for life, and therefore the principle I have stated applies. Accordingly this appeal must be allowed.

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COZENS-HARDY L.J. I agree; and in my opinion the principle stated by Amphlett B. in *Treharne* v. *Layton* (1) is applicable to this case. I also agree with Romer L.J., that the gift in this will to the children of the nephew is plainly a vested gift; and, that being so, I do not see how the question whether the testatrix knew of the existence of a child can be relevant. In my opinion, therefore, this appeal should be allowed.

Solicitors: *Sharpe, Parker & Co., for Cobbold, Sons & Co., Ipswich; White, Borrett & Co., for Westhorp, Cobbold & Ward, Ipswich.*

(1) L. R. 10 Q. B. 459.

G. I. F. C.

KEKEWICH J.

1903

June 9.

CARTWRIGHT *v.* CARTWRIGHT.

[1903 C. 827.]

Settlement—Covenant for Payment to Trustees—Policies subsequently effected by Settlor for Benefit of Wife and Children—Satisfaction.

By a marriage settlement in 1864 the settlor covenanted with the trustees for the payment to them in his lifetime, or within six months after his decease, of a sum of 2000*l.*, to be held in trust for the wife for life, and after her death for the settlor for life, and after the decease of the survivor for the children of the marriage and of a former marriage as the husband and wife should jointly appoint, and in default of appointment for the children of both marriages, sons at twenty-one and daughters at twenty-one or marriage. In January, 1873, the settlor effected two policies on his own life, each for 1000*l.*, under the provisions of s. 10 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), each policy being expressed to be "for the benefit of his wife and children." At his death in 1902 the covenant remained unperformed:—

Held, that, having regard to the difference between the provisions under the settlement and under the policies, it was impossible to hold that the settlor, when he effected the policies, intended that the policy moneys should be taken in substitution for the benefits under the settlement, and that therefore the provision which the settlor made by the policies was not by way of satisfaction of the covenant.

William Ambrose Cartwright in the year 1849 was married to his first wife, Ann Haywood Bailey, by whom he had six children, namely, William Thomas Cartwright, Thomas Bailey Cartwright, Carrie Shrewsbury Pickworth, and James Cartwright, and two others who died in infancy. His wife died in 1862.

By an indenture of settlement dated March 29, 1864, made in contemplation of the intended marriage of W. A. Cartwright with Betsey Amatt, W. A. Cartwright covenanted with the trustees that in case the marriage should be solemnized he, W. A. Cartwright, in his lifetime, or his executors or administrators within six calendar months after his death, should pay or secure to be paid unto the trustees for the time being the sum of 2000*l.*, and should in the meantime pay interest thereon after the rate of 5*l.* per centum per annum from the day of the marriage, and it was declared that the trustees should stand possessed of the said sum of 2000*l.* and the investments repre-

senting the same upon trust to pay the dividends to Betsey Amatt for her life for her separate use without power of anticipation, and after her death to pay the same unto W. A. Cartwright and his assigns during his life, and after the death of the survivor of W. A. Cartwright and Betsey Amatt in trust as to both capital and income for the children or child of the said intended marriage, and the children or child of W. A. Cartwright by his former marriage as W. A. Cartwright and Betsey Amatt should jointly appoint, and in default of such joint appointment for all and every the children or child of the said intended marriage and the children or child of W. A. Cartwright by his former marriage, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry under that age with the consent of her or their parent or guardian, and to be divided between the said children, if more than one, in equal shares as tenants in common.

The marriage of W. A. Cartwright and Betsey Amatt was duly solemnized on March 30, 1864. W. A. Cartwright did not pay the sum of 2000*l.* or any other sum to the trustees of the settlement. The joint power of appointment conferred by the settlement was never exercised.

On the 2nd and 30th days of January, 1873, respectively, W. A. Cartwright took out two policies on his own life each for 1000*l.*, and numbered respectively 36,398 and 36,695, with the Scottish Widows Fund Life Assurance Society under the provisions of s. 10 of the Married Women's Property Act, 1870. Upon each policy there appeared the following recital: "and whereas this policy is effected by the said W. A. Cartwright for the benefit of his wife and children for their separate use in terms of the Married Women's Property Act, 1870, s. 10." W. A. Cartwright duly paid the premiums in respect of the said two policies, upon which, including bonuses, the sum of 3200*l.* became payable on his death.

Betsey Cartwright died on May 6, 1893, having had issue of her marriage three children, namely, Henry Ernest Cartwright, George Archibald Cartwright, and another who died in infancy.

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By his will dated April 17, 1902, W. A. Cartwright appointed executors and trustees, and after making certain pecuniary bequests gave, devised, and bequeathed all his real estate and the residue of his personal estate unto his trustees upon trust to sell, convert into money, and invest as therein mentioned, and to stand possessed of the residuary trust moneys and the investments representing the same upon trust to pay the income thereof to his third wife during her life, and after her decease as well the capital as the income for his children the defendant Carrie Shrewsbury Pickworth and the said Henry Ernest Cartwright and George Archibald Cartwright in equal shares.

The testator died on November 6, 1902, and his will was duly proved by the executors.

All the six above-named children of the testator had respectively attained the age of twenty-one years.

This summons was taken out by the executors of the will of W. A. Cartwright as plaintiffs against James Cartwright, Carrie Shrewsbury Pickworth, and the executors of the last surviving trustee of the settlement of March 29, 1864, for the determination of the questions whether the defendants, the executors of the surviving trustee of the settlement of March 29, 1864, were entitled to rank as creditors of the estate of the testator W. A. Cartwright for any and what sum in respect of the covenants by the testator contained in the said settlement, and whether such covenants had been to any and what extent satisfied by the moneys arising from the two policies on his life, each for 1000*l.*, taken out by the testator in January, 1873, in the Scottish Widows Fund Life Assurance Society.

The summons was adjourned into Court, and now came on for hearing.

R. J. Parker, for the plaintiffs, the executors of W. A. Cartwright, stated the case to the Court.

O. L. Clare, for the defendant James Cartwright. This defendant is interested both under the settlement and under the policies, but not under the will, and it is therefore to his interest to contend that there is no satisfaction. There is no

authority directly in point, nor is there any case in the books at all near to the present case as regards the facts, but the principles to be applied are well established. The question is purely one of the intention of the settlor to be ascertained from the circumstances existing at the time when he effected the policies: see *Lord Chichester* v. *Coventry* (1), and in particular the observations of Lord Romilly. (2) The true inference is that when the settlor effected the policies he intended to confer on his wife and children additional and different benefits from those conferred by the settlement. He might have made the policies correspond with the settlement; but instead of doing that, he insured merely for the benefit of the wife and children. The differences between the provisions of the settlement and those of the policies are very marked. The settlement gave the wife a life interest; under the policies she takes an interest in the corpus. Under the settlement the children took in futuro contingently on attaining twenty-one or (if daughters) on marriage with consent; under the policies they take immediately as joint tenants: *In re Seyton*. (3) It is impossible, therefore, to infer any intention on the part of the testator that the policies are to be a satisfaction of the covenant, so as to put the beneficiaries to their election as between the benefits under the covenant and those under the policies.

Rolt, for the defendant Carrie S. Pickworth. I contend that the policies are a satisfaction of the covenant, so that the trustees of the settlement, although they may have a right of action under the covenant, would not be allowed by the Court to exercise it: *Davis* v. *Chambers*. (4) The presumption of law is in favour of satisfaction, and against double portions, and therefore the onus is on the other side to shew that satisfaction was not intended. It is submitted that that onus has not been discharged. Here a settlor who has covenanted to pay 2000*l*. to the trustees of his marriage settlement effects policies for that precise amount in favour of the objects of the settlement. No doubt the interests conferred on the beneficiaries under the one instrument and the others are not identical; but

(1) (1867) L. R. 2 H. L. 71.
(2) Ibid. 90, 91, 95.
(3) (1887) 34 Ch. D. 511.
(4) (1857) 7 D. M. & G. 386.

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that circumstance is not conclusive. In *Mayd* v. *Field* (1) a testatrix who had covenanted to pay 1000*l.* to trustees upon certain trusts by her will settled that sum on like trusts, but omitting a life interest to her daughter's husband which was given under the covenant, and it was held that the case was one of satisfaction, notwithstanding the omission of the life interest. The circumstance that the children take as joint tenants under the policies is not material, because it is competent for them if they think fit to sever the joint tenancy. [He referred also to *Jesson* v. *Jesson*. (2)]

Henry Johnston, for the trustees of the settlement.

KEKEWICH J. The question for decision is entirely new as regards the authorities, but it is by no means new in substance or in principle. Stated shortly it is this: whether a covenant in a marriage settlement to pay 2000*l.* to the trustees of the settlement has been satisfied by policies for that sum effected by the covenantor. The amount actually payable under the policies is, by accretion of bonuses, considerably more than 2000*l.*, but for the present purpose I disregard that circumstance, and assume that the 2000*l.* payable under the covenant and the 2000*l.* payable under the policies are in substance identical sums. In considering the question whether a covenant of this kind has been "satisfied"—for that, according to the authorities, is a proper form of expression—it must be borne in mind that a man who has covenanted to pay 2000*l.* or any other sum to the trustees of a settlement can satisfy the obligation of that covenant only by paying that sum to those trustees. He must do what he has covenanted to do, and nothing else can be, strictly speaking, a satisfaction. But a covenantor may, if he pleases, make a provision which is intended by him to satisfy the covenant, and either because he has so expressed himself, or because it is to be so inferred from surrounding circumstances, he may be held to mean that the beneficiaries under the covenant shall take what he has provided for them instead of that which they would take under the covenant. The result is that a beneficiary is put to his

(1) (1876) 3 Ch. D. 587. (2) (1691) 2 Vern. 255.

election between the benefit of the covenant and the benefit of the provision; he cannot take both. It is necessary to bear that in mind, because the whole question is purely one of intention. I turn now to the covenant. [His Lordship then stated the terms of the settlement as above set out, and continued:—]

The life interest given to the settlor would of course not be applicable to money coming in after his death, and it is to be observed that the power of appointment is unusual, being only to the husband and wife jointly and not to the survivor. The settlor having entered into this covenant, some time afterwards effected two policies under s. 10 of the Married Women's Property Act, 1870, for the benefit of his wife and children. The effect of that is that the wife and children surviving him take as joint tenants. The children would take whether they attained twenty-one or not, and they would take quite irrespectively of any power of appointment. The wife instead of taking a life interest takes a share, which might be more or less, in the principal, and a share which might have been much increased by children dying in her lifetime without having severed the joint tenancy. Mr. Rolt has argued that the onus is on those who seek to shew that such a provision is not a satisfaction. Be it so. There could hardly be a greater difference between two provisions than that which exists here. In the one case, a joint tenancy between wife and children without any power of appointment. In the other case, a life interest to the wife with a power of appointment amongst children. It seems to me impossible to conceive that when this gentleman effected these policies he really intended that the children taking under his marriage settlement were to accept what he provided for them under the policies in lieu of what was given to them under the settlement. I therefore hold that this is not a case of satisfaction.

Solicitors: *Grover, Humphreys & Son; Field, Roscoe & Co., for Joseph Hands, Loughborough; Woosnam & Smith.*

C. C. M. D.

BYRNE J.

1903

May 8, 9, 22, 27.

CARTER *v.* ROBERTS.

[1902 C. 1098.]

Practice—Motion for Attachment—Affidavit in support—Exhibits—Service of Exhibits—Undertaking—Omission to fix Time—Partnership—Committal for Non-payment of Money—Rules of Supreme Court, 1883, *Order* XLI., *r.* 5; *Order* LII., *r.* 4—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

It is not necessary within the terms of rule 4 of Order LII. to serve copies of the exhibits to the affidavit on which a motion to attach is founded with the notice of motion and affidavit; but a party moving to attach who does not serve copies of any exhibits reasonably necessary to enable the respondent thoroughly to understand the grounds upon which the application is being made, runs the risk of having the motion dismissed on the ground that the evidence has not been properly brought to the notice of the respondent.

Where an undertaking to pay money into court or to a joint account at a bank has been given, without fixing any time for payment, an order fixing a time is necessary before the undertaking can be enforced; though there may be cases of contempt so gross as to justify attachment without any supplemental order.

An undertaking in a partnership action to pay money into court or to a joint account at a bank cannot be enforced by attachment or committal, having regard to the prohibition in the Debtors Act, 1869, s. 4, against imprisonment for default in payment of a sum of money, except in the cases specified by that section.

MOTION.

In April, 1902, the plaintiff commenced this action to set aside a partnership between himself and the defendant as veterinary surgeons on the ground of misrepresentation, and, alternatively, for a dissolution of the partnership.

In August, 1902, upon the hearing of a motion in the action on behalf of the plaintiff for the appointment of a receiver, the following order was made: "The plaintiff and the defendant by their respective counsel respectively undertaking to pay all sums of money which shall be received by them in respect of the matters in dispute in this action to the credit of the partnership account of the plaintiff and defendant with Messrs. Eyton, Burton & Co., bankers, Ludlow, this Court

doth order that the said motion do stand over until the trial of this action."

The defendant did not, according to the plaintiff, properly carry out his undertaking, and the plaintiff accordingly served him with a notice of motion for May 8, asking that the defendant might be committed for his contempt in not paying in to the partnership account, in accordance with his undertaking of August, 1902, certain sums of money, specified in the notice of motion, received by him and belonging to the partnership, or, in the alternative, that the plaintiff might be at liberty to issue a writ of attachment against the defendant for his contempt. The notice of motion also asked for the appointment of a receiver. The affidavit in support of the motion made various cheques, some four or five in number, also a receipt for money paid and signed by the defendant, exhibits. It also made an exhibit of a local newspaper with an account of larceny proceedings taken by the plaintiff against the defendant.

Levett, K.C., and *Douglas*, for the plaintiff, stated that though the defendant had been duly served with the notice of motion and with a copy of the affidavit on which the motion was founded, in accordance with Order LII., r. 4, still, as he had not been served in due time with copies of the exhibits mentioned in the affidavit, they proposed to stand the motion over for a week that the defendant might be properly served with copies of the exhibits.

Rowden, K.C., and *P. F. Stokes*, for the defendant, objected to any adjournment, and raised a preliminary objection that the motion was irregular. As copies of the exhibits have not been served with the affidavit, Order LII., r. 4, has not been complied with; the motion is therefore irregular, and the defendant is entitled to have it dismissed at once; the objection on the ground of irregularity has been taken at the earliest possible moment, and no adjournment ought to be allowed: *Rendell* v. *Grundy*. (1) Copies of the exhibits must be served with the affidavit and notice of motion: *Rosenbaum* v.

(1) [1895] 1 Q. B. 16.

BYRNE J. 1903 CARTER v. ROBERTS.

Belson (1), which is precisely in point. The Court will not condone any non-compliance with the rules upon an application affecting the liberty of the subject: *Taylor* v. *Roe.* (2) That an exhibit is part of an affidavit is clear from *In re Hinchcliffe.* (3) The preliminary objection on the ground of irregularity is fatal to the motion, which should therefore be dismissed at once.

Levett, K.C., in reply. For purposes of inspection or production, an exhibit may be part of an affidavit—that is all that *In re Hinchcliffe* (3) decided: that case is explained in *Sloane* v. *Britain Steamship Co.* (4) A similar objection to the present was overruled by Stirling J. in *In re Hutchings.* (5) The only object of serving the exhibits is to let the respondent know the grounds upon which the motion will be made, and the evidence in support of it. The defendant in this case has seen the exhibits, and, even if he had not, they are not essential; the motion is to commit him for non-payment of the sums mentioned in the notice of motion. Order LII., r. 4, does not in terms include exhibits: in some cases it would be impossible to serve the respondent with the exhibits; in other cases it would be most oppressive to do so. This motion is not irregular within the wording of the rule, and the plaintiff is entitled to have it adjourned.

Cur. adv. vult.

May 9. BYRNE J., after stating the nature of the motion, the facts as to the non-service of the exhibits, and the proposal of the plaintiff's counsel to adjourn the motion, continued:—Counsel for the defendant objected to any adjournment of the motion, and in effect said: "No. So far as it is a motion for committal, I am entitled to take the objection that there has been an irregularity: this is a matter strictissimi juris, and if the rules have not been complied with I am entitled now to ask that the motion, so far as it seeks a committal, may be dismissed with costs."

(1) W. N. (1901) 124.
(2) (1893) 68 L. T. 213.
(3) [1895] 1 Ch. 117.
(4) [1897] 1 Q. B. 185.
(5) W. N. (1887) 254.

The rule upon which this depends is Order LII., r. 4, which is as follows: "Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion." There are two short notes in the *Weekly Notes* bearing upon the question. One is a case which came before Stirling J., *In re Hutchings*. (1) In that case a preliminary objection to the motion was taken, on the ground that copies of the exhibits had not been served with the notice of motion in accordance with the Rules of the Supreme Court of 1883. Stirling J. in overruling the objection said that, although the rule did not in terms extend to the exhibits, he was far from saying that they ought not to be delivered with the affidavits. But in this case the respondent had seen all the exhibits, and had filed affidavits in reply, in which he had dealt with them all. So that it is not really a decision on the point, because, as I read it, the learned judge thought that if it was a good objection it had been waived. Then it appears that there was a case which came before me in 1901, *Rosenbaum* v. *Belson*. (2) This is the whole of the note: "Copies of exhibits (if any) to the affidavit intended to be used in support of a motion for attachment must be served on the defendant with the notice of motion and affidavit."

I have a vague recollection of the case. The party appeared in person, and said he had not had the exhibits. So far as I remember, counsel for the plaintiff was not then prepared for the objection, and, I think, I personally sent for the books and endeavoured to find out what the practice was at the time. I see there is a short note of the same case in the *Solicitors' Journal*, vol. xlv. p. 576, in which it is put in this form: "This was a motion by the plaintiff for a writ of attachment against the defendant in the action. The plaintiff had served on the defendant the notice of motion and copies of affidavits intended to be used on the motion, but not a copy of the exhibits to the affidavits. The defendant, who appeared in

(1) W. N. (1887) 254. (2) W. N. (1901) 124.

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person, took the objection that he had not been served with copies of the exhibits, and the learned judge held that the defendant was entitled to be served with copies of the exhibits." I cannot call to mind whether I dismissed the motion on the ground that they had not been served. If so, and if it was done on that general ground, I am not prepared to say that I was right. (1) I have now had the opportunity of hearing the case fully and carefully argued by counsel on both sides, and I will state the conclusion which I have come to. I think, for some purposes in the rules, exhibits are to be regarded and treated as part of the affidavit; undoubtedly, in other respects and for other purposes they are not part of the affidavit. I will take, for instance, Order XXXVIII., r. 10: "Every affidavit or other proof used in Admiralty actions shall be filed in the Admiralty Registry: every affidavit used in Probate actions shall be filed in the Probate Registry: every affidavit used on the Crown side of the Queen's Bench Division shall be filed in the Crown Office Department: every affidavit used in a cause or matter proceeding in a District Registry shall be filed there: and every other affidavit used shall be filed n the Central Office. There shall be *indorsed on* every affidavit a note shewing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the Court or a judge shall otherwise direct."

It is quite clear that what is to be filed, the affidavit, there, does not include the exhibits. The exhibits are not filed. The exhibits remain with the persons to whom they belong, and they are not filed. So in Order XXXVIII., r. 23: "Accounts, extracts from parish registers, particulars of creditors' debts, and other documents referred to by affidavit, shall not be annexed to the affidavit, or referred to in the affidavit as annexed, but shall be referred to as exhibits."

Under that rule, and for the purposes of that rule, the Court of Appeal held in *In re Hinchcliffe* (2) that the exhibit was

(1) It has since been ascertained from counsel engaged in the case that the motion simply stood over at the request of the defendant in order that he might have copies of the exhibits. —W. C. D.

(2) [1895] 1 Ch. 117.

part of the affidavit—that is to say, part of the affidavit for the purpose of a right to inspect. Now I go back to Order LII., r. 4, and, as Stirling J. said in the case I have referred to, exhibits are not within the terms of the rule. That I take as meaning that the word "affidavit" does not in terms include exhibits. It has been pointed out in the course of the argument, and with great justice, that it would be perfectly impossible in the case of some exhibits to serve copies. For example, there might be a motion to attach in respect of some breach of an order to restrain infringement, involving the necessity, in order to bring strict proof, to exhibit an iron safe weighing a ton. Mr. Levett suggested it might be the case of selling a box of cigars. How could you give a copy of the safe or a copy of the box of cigars? It is obvious that it would be impossible to comply with such a rule in certain cases. Then there are other cases in which it would be most oppressive to the parties, either to the party moving or to the respondent should the motion be successful and he have to pay the costs of it, to serve copies of all written exhibits. I may take as an illustration that it might be necessary to exhibit a copy of a long account, the original of which was known to be in the respondent's possession. In that case it would seem to be primâ facie oppressive on the respondent, if he should thereafter have to pay the costs of the motion, to serve him with a copy of the exhibit, because he would have to pay for a document the original of which he had got in his own possession, and the contents of which he knew exactly. I have come to the conclusion that it is not, within the terms of the order, necessary to serve exhibits or copies of exhibits to the affidavit so as to impose upon the moving party the absolute result of having his motion dismissed for irregularity in default of so doing. At the same time it is obvious, as was said by Kekewich J. in a case before him (1), and as has been said before, that the meaning and intention of the rule is that the defendant shall have fair notice, not merely of the grounds on which the motion is made, but of the evidence on which it is founded, and, although not coming strictly within the terms of

(1) 68 L. T. 213.

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the rule, I think that a party moving to attach who did not furnish copies of such exhibits as were reasonably necessary to enable the defendant to understand and know the nature of the evidence that would be brought against him would be in peril of having his motion dismissed on the ground that he had not sufficiently brought the matter to the notice of the respondents. It must depend, I should think, on the circumstances of the particular case. Suppose a motion were made to commit, and it became necessary to take it upon affidavit of service, if the Court found on investigation that the affidavit without the exhibit did not thoroughly give the true grounds, and the nature of the evidence upon which it was intended to rely, I think the Court would then refuse the motion.

I have come to the conclusion that the preliminary objection fails; the plaintiff has not been guilty of any fatal irregularity within the rule, and he is therefore entitled to have the motion adjourned as proposed.

On the motion being opened on a subsequent day—

Rowden, K.C., and *P. F. Stokes*, for the defendant. There are two further objections to this motion, either of which is fatal to the application to commit. The appointment of a receiver is not resisted. As to the motion to commit, first we say it is bad because no time was limited for the fulfilment of the undertaking. Order LXI., r. 5, provides that any order requiring a person to do an act shall state the time within which the act is to be done; the analogy of this rule applies to the case of an undertaking: *Gilbert* v. *Endean* (1); *Halford* v. *Hardy* (2), where the question of enforcing an undertaking was considered. It is only reasonable that some time should be limited, and if no time is fixed in the undertaking a four-day order should be obtained and served. [The Annual Practice, 1903, pp. 549, 550, and *D.* v. *A. & Co.* (3) were referred to.] Secondly, since the Debtors Act, 1869, a person cannot be put to prison for making default in payment of a sum of money, except for one or other of the cases specified in

(1) (1878) 9 Ch. D. 259. (2) (1899) 81 L. T. 721.
(3) [1900] 1 Ch. 484.

s. 4; the present case is not within that section. The observations of Bacon C.J. in *Ex parte Cuddeford* (1) are in point. [Oswald on Contempt, 2nd ed. p. 109, was also referred to.]

Levett, K.C., and *Douglas*, for the plaintiff. An undertaking is on an entirely different footing from an order. A person giving an undertaking knows exactly what it is he undertakes to do, and in a case like this no time need be fixed. An undertaking is a distinct promise made to the Court with a distinct object, and if anything is done or omitted which is inconsistent with this promise it is a contempt of Court. On the faith of this undertaking the Court abstained from appointing a receiver in August last. The analogy of Order XLI., r. 5, does not apply. The Debtors Act has no application; there is no order for payment of money; there is an undertaking, or promise to pay into a joint account whatever partnership money the defendant receives; not to keep this promise is a gross contempt of Court. The evidence shews that the payments that were made were only made under the pressure of this motion.

Rowden, K.C., in reply.

Cur. adv. vult.

May 27. BYRNE J. I did not give judgment at the conclusion of the arguments, not that I had any doubt as to what I ought to do with the motion, but because I wished to guard myself against hastily laying down any rule on the points which have been argued in too general terms. The action is not a common partnership action, but it is an action to set aside the contract of partnership on the ground of misrepresentation, and there is involved in it a charge of some kind of fraud. The notice of motion asks first for the committal or attachment of the defendant, then for the appointment of a receiver.

So far as the appointment of a receiver is sought, this was not opposed at the bar, and the order will go accordingly; but two technical objections were taken to the first part of the motion. One was that no time is mentioned for the fulfilment

(1) (1876) 45 L. J. (Bank.) 127.

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of the undertaking in the order containing the undertaking; and the other that in any event an order to commit for non-payment of money cannot be made, having regard to the fact that these moneys were not payable under circumstances bringing the case within any of the exceptions specified in s. 4 of the Debtors Act.

With reference to the first of these points, Order XLI., r. 5, is referred to: "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum"—which it quotes. That rule, as was pointed out by Sir George Jessel in *Gilbert* v. *Endean* (1), does not apply to an undertaking. The question of the enforcement of an undertaking for payment of money was considered by Kekewich J. in the case of *Halford* v. *Hardy*. (2) There the undertaking was not for the payment of money, but the order was "forthwith" to execute a certain indenture, and no time was mentioned further. The learned judge says: "It is remarkable that the question of what service is necessary in the case of the enforcement of a positive undertaking to do an act has never, so far as I am aware, arisen in practice. The point is one of general importance, and, having had an opportunity of consulting all the judges of the Chancery Division (except North J.), I think I may say that there is a consensus of opinion, more or less strong, that in the case of an undertaking of this kind there ought either to be service in accordance with Order XLI., r. 5, or an order in the nature of a four-day order." Then he deals with the particular case, and he says the word "forthwith" was a sufficient expression of time on the authority of *Thomas* v. *Nokes*. (3) The case before Cozens-Hardy J. of *D.* v. *A. & Co.* (4) does not involve this point, because the undertaking there was to do something on or before a named day.

(1) 9 Ch. D. 259.
(2) 81 L. T. 721, 722.
(3) (1868) L. R. 6 Eq. 521.
(4) [1900] 1 Ch. 484.

I am not going to lay down any general rule as to undertakings, that they can never be enforced by attachment or committal because a time is not mentioned. It depends of course on the nature of the undertaking; but in a simple case, where there is an undertaking to pay into court or to a joint account, it does not appear to me that the position ought to be worse for the party undertaking to pay, than if an order had been made, and if it is desired to enforce the undertaking, no time having been mentioned, an order fixing the time ought to be obtained first, or relief may be obtained by an application for the appointment of a receiver, if it is a proper case for such an appointment. I will not say that there cannot be a case where, on an undertaking of this kind, there may not be (even although it be for payment of money) so gross a contempt of Court, apart from the non-payment, as to justify a committal; and by way of illustration if a man, having given an undertaking to pay moneys, proceeds of certain cheques, into court, deliberately went and tore up the cheques, so as to put it out of his power ever to comply with his undertaking, I think that a different element would come in—that there might be a contempt apart from the non-payment of the money.

The present case is certainly peculiar, because with reference to certain of the items which are complained of, and which are referred to specifically in the notice of motion, they were actually paid before the motion was made. One item which is complained about was received before the date of the undertaking, and did not come within it at all; as to another item, the money was paid long before the motion; with reference to other items, the money was paid after notice of motion; and at the time when the motion was brought on in Court there was not anything shewn to be due in respect of the undertaking that had been given.

I am further of opinion that the second technical objection that was taken is also quite fatal to the present application, namely, the objection that a person cannot be committed for non-payment of a sum of money except in certain cases specified in s. 4 of the Debtors Act, 1869, and it was not pretended that this came within those specified cases. But then it was very

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strongly urged upon me that this was a case in which a contempt could be made out upon the facts which would justify a committal, even although payment had been made to the uttermost before the date of the actual application. I have heard the evidence, and I cannot say that such a case has been made out, although the defendant has undoubtedly been at least guilty of carelessness, and not merely of carelessness in the first instance, but carelessness in some of the explanations that he gave, and in one case his original explanation broke down altogether.

[Having stated his reasons for going into the facts and observing that a portion of the motion was oppressive, his Lordship said that a case for a receiver having been made out, and there being an issue of fraud to be tried, he thought he should be doing justice by making the costs of the motion costs in the action.]

Solicitors: *Jaques & Co., for C. Beaumont Cottam, Ludlow; Chester, Broome & Griffithes, for Weyman & Weyman, Ludlow.*

W. C. D.

PRESTON *v.* TUNBRIDGE WELLS OPERA HOUSE, LIMITED.

FARWELL J.

1903

Feb. 6.

[1902 P. 2665.]

Mortgage—Second Mortgagees' Action for a Receiver—Back Rents paid to Receiver—Right of first Mortgagee against Receiver.

In an action by second mortgagees against the mortgagor, to which the first mortgagee was not a party, a receiver was appointed of the rents of mortgaged premises subject to the rights of the first mortgagee. On motion in the action by the first mortgagee to discharge the receiver and to be let into possession:—

Held, that the first mortgagee was entitled to back rents paid to the receiver after the date of the service of his notice of motion.

MOTION.

By deed dated May 31, 1902, the defendant company mortgaged certain premises to a bank as security for 23,600*l.* and interest.

By another deed dated July 1, 1902, the defendant company mortgaged the same premises to the plaintiffs (subject to the bank's mortgage) as security for 5145*l.* and interest, and further advances.

In December, 1902, the defendant company being in difficulties, the plaintiffs commenced this action against the company, claiming the appointment of a receiver of the rents of the property comprised in their mortgage of July 1, 1902; and on January 17, 1903, on motion by the plaintiffs, Thomas Buss (one of the plaintiffs) was appointed receiver of the rents of the premises comprised in the plaintiffs' security, without prejudice to the rights of prior mortgagees, and it was ordered that the tenants of the mortgaged premises should, without prejudice and subject as aforesaid, attorn and pay their rents in arrear and growing rents to such receiver.

In the meantime the bank, who had not been made parties to the action, on January 6, 1903, transferred their mortgage to one Jarvis, and he on January 7 gave notice to the plaintiffs and defendants calling in his mortgage debt, and also gave

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notice to the tenants to pay their rents then due and to accrue due to him; and on January 23, on motion in the action by Jarvis, as first mortgagee, to discharge the receiver, or, alternatively, to be let into possession and receipt of the rents, it was ordered that the applicant should be let into possession of those parts of the mortgaged premises which were unlet, and into receipt of the rents and profits of those parts which were let; and it was ordered that the receiver should concur with the applicant in giving notice to all the tenants to pay their rents in arrear and growing rents to the applicant, and that the receiver should furnish to the applicant a statement of all rents collected or received by him since January 7, and the rest of the motion was ordered to stand over.

Jarvis' notice of motion had been served on all parties on January 17; and it appeared from the statement furnished by the receiver that he had been paid on January 19, by a tenant of part of the mortgaged premises, a sum of 127*l.* 10*s.* 8*d.*, being the rent for the quarter ending December 25, 1902. The plaintiffs objected that this sum was not payable to Jarvis, whose motion now came on for further hearing.

Upjohn, K.C., and *George Lawrence*, for the motion. The first mortgagee is entitled to this sum which came into the hands of the receiver after the date of the service of his notice of motion.

Hewitt, for the plaintiffs. A first mortgagee is only entitled to the rents which accrue due after he is let into possession of the mortgaged premises. That would be from the time the receiver is discharged: *Thomas* v. *Brigstocke*. (1) Here, that date would be January 23 at the earliest.

The defendants did not appear.

FARWELL J. I am of opinion that the first mortgagee is entitled to this sum of money. Mr. Hewitt has argued that the first mortgagee is only entitled to the rents arising from the mortgaged property after he has obtained the discharge of the receiver appointed on behalf of the second mortgagees, and

(1) (1827) 4 Russ. 64; 28 R. R. 4.

relied on *Thomas* v. *Brigstocke*. (1) But that case was very different from the present. It was an action to administer the trusts of the will of a deceased mortgagor, in which a receiver had been appointed who collected rents and paid them into court, and some time afterwards a mortgagee came and claimed them; and in that case the Master of the Rolls (Sir John Leach) in giving judgment says that a mortgagee may be considered to be in possession "from the time of the discharge of the receiver, or perhaps from the time when his application was first made for that discharge." In my opinion the latter date mentioned by the Master of the Rolls is the correct one. It is due to the exigencies of the business of the Courts that an application cannot be heard the moment it is made, and I think the first mortgagee should not be made to suffer from the necessary delay arising from this cause. *Thomas* v. *Brigstocke* (1) and other authorities were considered by Stirling J. in the case of *In re Hoare* (2), and he there states the true rule to be, "that where money is in the hands of a receiver you must look in each case to all the circumstances, and in particular to the nature of the action and the object of the appointment of the receiver. Where the object of the action is to ascertain who are the incumbrancers on a particular property and their priorities, or to settle a dispute as to title, it may well be that the receiver holds money coming into his hands on behalf of the person who may prove to be the true owner." Applying that rule to this case, which is a mortgagees' action, I am of opinion that the first mortgagee, from the date of the service of his notice of motion, must be treated as having been in possession of the mortgaged property, and therefore entitled to the rents and profits which from that date came into the hands of the receiver. In this case that date is January 17. The receiver, therefore, holds this money on behalf of the first mortgagee as the person entitled.

Solicitors: *Sharpe, Parker & Co., for Cripps, Son & Daish, Tunbridge Wells; H. P. Duggan.*

(1) 4 Russ. 64, 65; 28 R. R. 4. (2) [1892] 3 Ch. 94, 103.

H. L. F.

FARWELL J.

1903

May 4.

In re CORBETT. CORBETT *v.* LORD COBHAM.

[1903 C. 439.]

Will—Ademption—Charitable Legacy—Gift to Endowment Fund—Particular Purpose.

A legacy to the trustees of the endowment fund of a hospital is a legacy for a particular purpose, and is therefore adeemed by a gift of the same amount to the same trustees in the testator's lifetime.

JOHN CORBETT, the testator in this matter, by his will dated May 5, 1898, after appointing executors and giving a number of pecuniary legacies, proceeded: "I bequeath the following charitable legacies, for which the receipts of the treasurer or other proper officer of the respective institutions hereinafter named shall be sufficient discharges, that is to say, to the trustees of the Infirmary, Worcester, 1000*l.*; to the trustees of the endowment fund of the Corbett Hospital, Stourbridge, 10,000*l.*"

The testator died on April 22, 1901. His will was proved on October 30, 1902.

The Corbett Hospital had been founded by the testator himself. He had purchased a freehold house and land for it, paid 2000*l.* for alterations to adapt the house for a hospital, and given 2000*l.* for the commencement of an endowment fund, and had appointed trustees and conveyed the hospital to them. On August 6, 1900, the testator wrote to Lord Cobham, who was president of the hospital and one of the trustees: "I am desirous of redeeming a promise which I think I made some time ago to advance a sum of 10,000*l.* in addition to the sum I have already advanced to endow the hospital in which I am interested at Stourbridge. Shall I send the cheque to you or the secretary of the hospital?"

The testator shortly afterwards sent the cheque, and it was duly paid and invested in the names of four of the trustees during the testator's lifetime.

This summons was taken out by the executor of the testator's will, who was also one of the trustees of the hospital, against his co-trustees for the determination of the question whether the gift of 10,000*l.* made by the testator to the hospital operated as an ademption or satisfaction of the legacy of 10,000*l.* contained in the will.

There was evidence that the testator had intended the gift in his lifetime to be a satisfaction of the legacy.

Upjohn, K.C., and *John Henderson*, for the testator's executors and residuary legatees. It is an established rule that where a legacy is given for a particular purpose it is adeemed by the testator's afterwards giving money for the same purpose: *Debeze* v. *Mann* (1); *In re Pollock.* (2) The Charitable Trusts Act, 1853, s. 62, and the different cases upon the meaning of endowment in that section, such as *In re Clergy Orphan Corporation* (3), draw a distinction between endowment and money belonging to the charity for its general purposes. The mere fact that the gift is to trustees may not be sufficient: *In re Smythies* (4); but it is plain that endowment is a particular purpose: *In re Fletcher.* (5) The mere existence of a debt to the testator's wife equal in amount to the legacy was held sufficient to shew a particular purpose to pay it. Parol evidence is admissible to shew the intention of the testator's gift in his lifetime.

Butcher, K.C., and *Whitmore L. Richards*, for the trustees of the hospital. The short point is, Is endowment of a hospital a particular purpose within the meaning of this rule? We say it cannot be, for it is a purpose which cannot be fully carried out by the gift of any particular sum. The testator was a man of very great wealth, and there is nothing, in law or in fact, to prevent his intending to leave 10,000*l.* more for endowment of this hospital because he had given one sum of 10,000*l.* in his lifetime.

(1) (1787) 2 Bro. C. C. 165; 1 R. R. 57.
(2) (1885) 28 Ch. D. 552.
(3) [1894] 3 Ch. 145.
(4) [1903] 1 Ch. 259.
(5) (1888) 38 Ch. D. 373.

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In Roper on Legacies, 4th. ed. p. 381, it is said that the purpose must exactly correspond; and the cases in which the rule has been applied are all cases where the purpose could be satisfied once for all, e.g., buying a house in Merrion Square: per Lord Manners in *Monck* v. *Lord Monck* (1); apprenticing a son: *Rosewell* v. *Bennett* (2); providing a portion on a daughter's marriage: *Debeze* v. *Mann.* (3)

In *Roome* v. *Roome* (4), where 1000*l.* was given to apprentice a son and for other purposes, it was held not to be adeemed pro tanto by the testator's spending a smaller sum in apprenticing him in his lifetime. And in *Pankhurst* v. *Howell* (5) a legacy of 200*l.* to be paid to testator's wife within ten days of his death was held not to be adeemed by a gift of 200*l.* that she might have money which she could control immediately.

Endowment is not a particular purpose: it shews the testator's intention that the capital should not be spent, but the income can be applied to any purpose.

FARWELL J. The gift by the will of the testator dated May, 1898, is to the trustees of the endowment fund of the Corbett Hospital, Stourbridge, 10,000*l.* In August, 1900, the testator gave 10,000*l.* to the trustees of the endowment fund, and he died in April, 1901. The question is whether the legacy is adeemed, and that turns on the question whether this is a gift for a particular purpose or whether it is not. The testator has made two consecutive gifts: "To the trustees of the Infirmary, Worcester, 1000*l.*; to the trustees of the endowment fund of the Corbett Hospital, Stourbridge, 10,000*l.*" The first one is obviously a general gift, and the trustees of the hospital may do as they please with it; but the object of the testator's bounty in the second is the Corbett Hospital endowment fund. The trustees cannot do as they please with it, but are prevented from spending the money as they please, and are bound to treat it as an endowment fund, using only the income of it.

(1) (1810) 1 Ball. & B. 298, 303; 12 R. R. 33.
(2) (1744) 3 Atk. 77.
(3) 2 Bro. C. C. 165; 1 R. R. 57.
(4) (1744) 3 Atk. 181.
(5) (1870) L. R. 6 Ch. 136.

A gift to trustees for the purpose of apprenticing A. B., a stranger, or a gift to trustees for the purpose of making an endowment for the benefit of A. B., a stranger, for his life with remainder to his children, would, in my opinion, both be gifts for a particular purpose. The case before Swinfen Eady J. of *In re Smythies* (1) was decided on the ground that a gift to A. in trust for B. was the same as a gift to B. The case before me is the creation of a fund the income of which goes in perpetuity, not for the general purposes of the hospital, but for the endowment of the hospital. In my opinion this is a particular purpose, and therefore, as the letters shew that the gift of 10,000*l.* afterwards was also for the purpose of endowing the hospital, the legacy is adeemed.

Solicitors: *Crowders, Vizard & Oldham; A. E. Bale, for Harwards & Co., Stourbridge.*

(1) [1903] 1 Ch. 259.

J. R. B.

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May 26, 27.

In re BARONESS LLANOVER.
HERBERT *v.* FRESHFIELD (2).

[1902 L. 2374.]

Will—Trust to accumulate Surplus Rents to buy Land—Accumulations Act, 1892 (55 & 56 *Vict. c.* 58), *s.* 1—*Will made before but taking effect after passing of the Act—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.

The Accumulations Act, 1892—which provides that after the passing of the Act there shall not, under any disposition of property, be any accumulation of rents or income for the purchase of land only, for any period longer than the minority of any person who, if of age, would for the time being be entitled to such rents or income—applies to a will made before and coming into operation after the passing of the Act.

ORIGINATING SUMMONS.

Augusta, Baroness Llanover, by her will dated August 16, 1889, after appointing the defendants and another party (since deceased) executors and trustees of her will, and after directing (clause 2) that the estates devised to her by the will of her late husband should be primarily liable to and charged with the payment of all incumbrances on the same, whether created by her late husband or not, and to all annuities which she might give by any codicil to her will, gave (clause 3) all freehold hereditaments devised to her by her said husband, and also her freehold house in Great Stanhope Street, Mayfair, London, and all other her freehold estates unto her said trustees upon trust with full powers of management and leasing. And the testatrix directed (clause 4) that her trustees or trustee should out of the rents and profits of the premises pay the expenses of such management, and should keep down any annual sums of money which might for the time being be charged upon the same premises or any part thereof (including the annuities given by any codicil), and the interest of any principal sums of money which might be charged upon the same premises, and subject thereto should pay (inter alia) an annuity of 1000*l.* to her daughter (the plaintiff) Charlotte Elizabeth Herbert during her life, and also certain annuities to other named persons. And

the testatrix directed (clause 5) that subject as aforesaid her trustees or trustee should apply such annual sums of money as should be necessary for keeping up the mansion-house and grounds at Llanover and the mansion and premises in Great Stanhope Street in a fit state for residence, and should permit the plaintiff during her life to reside at the mansion-house at Llanover and the mansion-house in Great Stanhope Street, and should pay her out of the said rents and profits an allowance of 80*l.* per week during such residence; "and subject as aforesaid my trustees or trustee shall during the life of my said daughter (the plaintiff), but not for a period of more than twenty years after my death, apply the ultimate surplus, if any, of the said rents and profits in the manner by the tenth clause of this my will directed concerning the proceeds of my residuary property"; and after the death of the plaintiff the trustees were to apply the said rents and profits for the benefit of other life tenants with remainders over; and in the case of each life tenant there was a similar direction as to the application of surplus rents and profits. And the testatrix gave (clause 10) the residue of her property, not disposed of by any codicil, to her trustees in trust "to realize the same and apply the proceeds in the discharge of incumbrances on the estates hereinbefore devised or in the purchase of other estates near the devised Llanover estate, and to be held on like trusts and subject to like powers and directions as the said last-mentioned estate."

The testatrix died on January 17, 1896. She had made three codicils (not material to this case), the last of which was made in February, 1892.

At the death of the testatrix there were various mortgages and charges on the estates which were eventually consolidated by the trustees into one mortgage of 100,000*l.* in favour of the University of Oxford, and this mortgage, under a provision in the mortgage deed, could not be paid off for some seven years to come. Since the death of the testatrix the ultimate surplus rents and profits, after payment of all costs and expenses of management and all annuities and keeping down the interest on all incumbrances, had been considerable, and had been

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accumulated by the trustees. The plaintiff alleged that these accumulations were now more than sufficient to pay off the mortgage of 100,000*l.*, and claimed a declaration that, having regard to the terms of the said will and to the Accumulations Act, 1892 (1), and as from the date upon which the defendant trustees first had in their hands or under their control moneys or funds sufficient and available for the discharge of the said mortgage to the University of Oxford, and thenceforth until January 17, 1916 (being the expiration of the period referred to in clause 5 of the said will, namely, twenty years from the death of the testatrix), the ultimate surplus rents and profits of the estates devised by the will of the said testatrix were undisposed of and payable to the plaintiff as the sole heiress-at-law and next of kin of the said testatrix. There was some conflict of evidence as to whether the accumulations in the hands of the trustees were sufficient to pay off the mortgage, having regard to the terms of the mortgage deed and to the annual sums required to pay the annuities and other outgoings; but after some discussion it was agreed that the case should be argued on the assumption that the accumulations were sufficient to discharge the mortgage.

Warmington, K.C., and *H. Fellows*, for the plaintiff. The direction to accumulate contained in the will is clearly within the Act. The words of the Act are "wholly or partially," and therefore apply to a case where the surplus income after payment of charges properly payable out of income, such as the annuities in this case, is directed to be invested in land: *In re Clutterbuck*. (2) But the further question arises, whether the Act applies in a case where the will was made before the passing of the Act, but the testator died after. This is not an

(1) The Accumulations Act, 1892, was passed on June 28, 1892, and enacts (s. 1): "No person shall, after the passing of this Act, settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulations would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated."

(2) [1901] 2 Ch. 285.

Act dealing with private rights in the sense in which that phrase is used in considering whether Acts of Parliament are retrospective. It is an Act passed on grounds of public policy. There is no decision upon the point under this Act, but there are decisions under several other Acts from which an analogy may be drawn. The first of these is the Apportionment Act, 1870, which was discussed in *Jones* v. *Ogle*. (1) That case was decided upon the ground that the profits there specifically given were not dividends within the meaning of the Apportionment Act, and also on the construction of the particular will; but Lord Selborne's judgment contains a dictum which would be decisive against us if it had been accepted. But it has not been accepted. *Capron* v. *Capron* (2), before Malins V.-C., *Hasluck* v. *Pedley* (3), before Sir George Jessel, and *Constable* v. *Constable* (4), before Fry J., are direct decisions that that Act applies to a will, made before, but coming into operation after, the passing of the Act. It is true that in all those cases there was a codicil executed after the passing of the Act, but all three judges expressed their opinion that this made no difference. *In re Bridger* (5) and *In re Hume* (6) are decisions to the same effect on the Mortmain Act of 1891; and in *In re Wylie* (7) Romer J. applied the same rule to the Married Women's Property Act, 1893. The words of the present Act, "No person shall, after the passing of this Act, settle or dispose of any property," are strongly in favour of making the Act apply, for property is not disposed of by will until the testator's death.

Upjohn, K.C., and *Howard Wright*, for the defendant trustees. The Act is not retrospective, and, even if it were, it does not apply here, for the trust is not simply for the purchase of land. The question whether the Act is retrospective is merely one of construction. The Act is prohibitive, and should be construed strictly. The words are plain. No

(1) (1872) L. R. 14 Eq. 419; on appeal, L. R. 8 Ch. 192.
(2) (1874) L. R. 17 Eq. 288.
(3) (1874) L. R. 19 Eq. 271.
(4) (1879) 11 Ch. D. 681.
(5) [1893] 1 Ch. 44; [1894] 1 Ch. 297.
(6) [1895] 1 Ch. 422.
(7) [1895] 2 Ch. 116.

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one "shall after the passing of this Act settle or dispose of any property." The words of futurity apply to the act of disposition, i.e., the making of a will, not its coming into operation.

[FARWELL J. The words are the same as are used in the Thellusson Act, 1800 (39 & 40 Geo. 3, c. 98); but s. 4 of that Act expressly provided that the Act was only to apply to a will made before the Act if the testator was living twelve months after the passing of the Act. That section is not repeated in the present Act, and it tells against you.]

"A statute is not to be construed retrospectively unless it is clear that such was the intention of the Legislature": that is the rule laid down by Sir George Jessel in *Quilter* v. *Mapleson*. (1) In this case the words are clear the other way: there is not even an ambiguity. The judgment of Romer J. in *In re Wylie* (2) is in our favour. Lastly, the Court will not interfere with the discretion of the trustees, and, if when the mortgage comes to be paid off the accumulations are then insufficient, the deficiency must be made good out of the rents by further accumulations.

Stirling, for defendant beneficiaries.

Warmington, K.C., in reply.

FARWELL J. I am of opinion that the Accumulations Act, 1892, applies to the will made before the Act of a testator who dies after the Act. The 4th section of the Thellusson Act, 1800, is only material in that it shews that the Legislature considered that that Act was retrospective, and the present Act adopts the same phraseology. The Act of 1892 was passed for the purpose of qualifying the powers of accumulation left by the Act of 1800 to testators and settlors. The old rule having been that you could accumulate rents to the same extent to which you could limit your property, that is to say, for a life or lives in being and twenty-one years afterwards, the Thellusson Act was passed for the purpose of restricting that power, and it allows four different periods of accumulation. Then this Act of 1892 qualifies those periods so far as the

(1) (1882) 9 Q. B. D. 672, 674. (2) [1895] 2 Ch. 116.

accumulations are directed for the purpose of making purchases of land only. The original Act, therefore, throws some light on the construction of the later Act. The object of both Acts was to prevent dispositions of real or personal estate in such a manner as was thought to be against public policy. Now it is to my mind plain that a testator does not settle or dispose of any property by his will unless and until such will is brought into effectual operation by his death. To take Lord Davey's phrase in *Beddington* v. *Baumann* (1), "A will is an ambulatory document, having no force or effect whatever until the death of the gentleman who made the will." When an Act says that no person shall dispose by will of any property, it means an effectual disposition by the will and the death of the testator both coalescing. Further, the 24th section of the Wills Act, 1837, makes the will speak with regard to all real and personal property comprised in it at the death of the testator. Reading this with the Thellusson Acts, it is clear that what is dealt with is the disposition of real or personal property by a will which with respect to the real and personal property comprised in it operates as an effectual disposition on the death of the testator. In my opinion, therefore, the Act does apply to the case of the will of a testator made before the Act when the testator dies after the Act.

Then the Act says that it is to be applied to cases where the disposition of property is made in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only. In my opinion that means, not that you can evade the Act by putting in some alternative such as the payment off of incumbrances, but that, so far as the will directs an accumulation for the purchase of land only, you must strike that out altogether. The result is that the tenth clause of the present will must be read as though it were, "I give the residue of my property, not disposed of by any codicil hereto, to my trustees in trust to realize the same and apply the proceeds in discharge of incumbrances on the estates hereinbefore devised"; and the rest of the clause, "or in the purchase of other estates near the devised

(1) [1903] A. C. 13, 19.

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Llanover estate and to be held on like trusts, &c.," must be deemed to be struck out by the effect of the Act of 1892.

Then it is said there is a sum of 100,000*l.* on mortgage, which is a mortgage for ten years, and that that makes a difference. That is quite true. I have no intention whatever of directing the trustees in any way to deviate from the terms of their trust. No charge has been made with regard to the conduct of the trustees in creating this mortgage as they did for a term of years, but no act of theirs can prejudice the rights of the parties under this clause. Now the trustees have in hand roughly 90,000*l.*, also a balance at the bankers of 28,000*l.* odd. Primâ facie, therefore, there is considerably more than enough to pay off the mortgage, if they could pay it off in fact. But they say they require the 28,000*l.* in the bank as a current balance. That may be right. At any rate, as the mortgage cannot be paid off now in consequence of the terms contained in it, it is not material to consider whether they ought to apply it so or not. I treat it as though there were 90,000*l.* available now. It is said also by the trustees that nothing that they can do by way of investing in Consols will bind the mortgagees, so that if the Consols fall the mortgagees will be bound to bear the loss. I agree, but I think the trustees will be safe if they accumulate and invest, say, 110,000*l.* cash in Consols, and they will then have sufficiently guarded against the claims of the mortgagees, especially as the plaintiff admits the right of the trustees, if the 110,000*l.* cash should prove insufficient to pay off the mortgage, to come against the subsequent surplus rents to make good the deficit.

Solicitors for plaintiff: *Hunter & Haynes.*
Solicitors for defendants: *Freshfields.*

H. L. F.

COWPER *v.* LAIDLER.

BUCKLEY J.

[1902 C. 3705.]

1903

Ancient Lights—Injunction or Damages — Future Injury — Oppression — Extortion—Jurisdiction—Lord Cairns' Act (21 & 22 *Vict. c.* 27), *s.* 2.

May 12, 13, 19.

The plaintiffs brought an action for an injunction to restrain the defendant from erecting a building so as to darken their ancient lights. The defendant alleged that the plaintiffs had bought their house merely with a view to extorting money from any person who tried to build on the defendant's land; that the action was therefore oppressive; that the injury (if any) would be trifling; and that it was a case for damages, and not for an injunction:—

Held, that the plaintiffs' windows were ancient lights, and would be materially interfered with by the defendant's proposed buildings; that it was not extortion or oppression on the part of the owner of an easement to ask a price which the property for exceptional reasons in fact commanded; and that an injunction ought to be granted.

The principles upon which the Court will give damages instead of an injunction discussed.

ACTION.

The plaintiffs were the owner in fee simple and the tenant of a cottage situated in Newcastle-upon-Tyne. They alleged that the cottage contained ancient lights consisting of (inter alia) a window in a room on the ground floor and another window in the room above, both looking south into a passage, and also a skylight in the roof of the cottage. Secondly, they contended that a small room under the same roof as the cottage formed part of the cottage, and had been wrongfully taken possession of by the defendant.

The defendant was the owner of adjoining premises, and he proposed to erect thereon buildings which the plaintiffs insisted would materially diminish the amount of light coming to their windows and skylight. They therefore brought an action for an injunction to restrain the defendant from (amongst other things) erecting any building in such a manner as to darken any of their ancient lights, and from pulling down or interfering with the room. These were the only points persevered with at the hearing.

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The defendant contended that the room belonged to him, and that the plaintiffs were not entitled to any ancient lights.

At the trial a number of witnesses were called on both sides, and the case turned mainly upon the result of the evidence.

Astbury, K.C., and *Maugham*, for the plaintiffs.

Buckmaster, K.C., and the *Hon. F. Russell*, for the defendant (after arguing the questions of fact). Even if these are ancient lights and the defendant's new building will obscure them, the injury will be trifling, and it is not a case for an injunction. Further, this is an oppressive action. The plaintiff Cowper bought the cottage simply with a view to extorting money from any one who should try to build on the defendant's land. In such circumstances the Court will give damages instead of an injunction: *Shelfer* v. *City of London Electric Lighting Co.* (1) The reason is not that an easement differs from other property, but that the plaintiffs in enforcing their rights have to come to the Court for a special remedy which will not be granted unless they have acted reasonably.

Astbury, K.C., in reply. Under Lord Cairns' Act (21 & 22 Vict. c. 27) damages could only be given instead of an injunction where the work had been completed: *Dreyfus* v. *Peruvian Guano Co.* (2) In this case the work has hardly been commenced. The plaintiffs have a legal right to the light, and if it will be obstructed by the proposed building they are entitled as of right to an injunction to prevent the completion of the building, unless there are special circumstances which disentitle them to relief: *Martin* v. *Price.* (3) A man is entitled to ask the highest price for his property.

O. L. Clare, amicus curiæ, referred to *Home and Colonial Stores* v. *Colls.* (4)

BUCKLEY J. reviewed the evidence, and held that the disputed room belonged to the defendant and not to the plaintiffs; and, secondly, that the plaintiffs' windows were ancient lights and would be substantially interfered with by the defendant's

(1) [1895] 1 Ch. 287, 316, 317.
(2) (1889) 43 Ch. D. 316, 333, 342.
(3) [1894] 1 Ch. 276.
(4) [1902] 1 Ch. 302.

proposed building. His Lordship reserved judgment on the question whether damages ought to be given instead of an injunction.

May 19. BUCKLEY J. read the following judgment:—In this case I have found as a fact that the access of light over the defendant's property to certain ancient lights of the plaintiffs'—namely, the ground-floor window and dormer window in the south wall of the plaintiffs' cottage, as heretofore enjoyed—will be substantially and materially interfered with by the defendant's proposed buildings. The buildings are not yet erected. The injunction asked for is prohibitory, not mandatory. The question upon which I reserved judgment is whether damages can be, or under the circumstances of this case ought to be, given to the plaintiffs instead of an injunction. Lord Cairns' Act (21 & 22 Vict. c. 27) was repealed by the Statute Law Revision and Civil Procedure Act, 1883, but by s. 5 (*b*) of that Act the jurisdiction of the Court under Lord Cairns' Act was preserved notwithstanding the repeal: *Sayers* v. *Collyer*. (1) The scope and effect of that Act have been frequently the subject of judicial comment and decision. The authorities seem to stand as follows: (1.) Where a mandatory injunction is asked, the Act gives jurisdiction to substitute damages for an injunction. (2.) Where the injunction asked is one to restrain a continuing nuisance, that is where the act has been done and there is an intention to continue to do it, then it would seem that there is jurisdiction to award damages instead of granting an injunction: *Shelfer* v. *City of London Electric Lighting Co.* (2), per A. L. Smith L.J. But (3.) where no wrongful act has been committed, but an injunction is sought to restrain its commission, the Court of Appeal has expressed a clear opinion in *Dreyfus* v. *Peruvian Guano Co.* (3) that Lord Cairns' Act confers no power to give damages in lieu of an injunction. This was the judgment of Bowen L.J., Fry L.J., and Cotton L.J. In *Martin* v. *Price* (4) (again in the Appeal Court) the question whether the Court has jurisdiction to award

(1) (1884) 28 Ch. D. 103, 107.
(2) [1895] 1 Ch. 287, 319.
(3) 43 Ch. D. 316, 333, 342.
(4) [1894] 1 Ch. 276.

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damages by way of compensation for an injury not yet committed, but only threatened and intended, was expressed to be by no means free from difficulty, but was not taken as concluded. *Dreyfus* v. *Peruvian Guano Co.* (1) was there referred to as having expressed a clear opinion against the existence of such jurisdiction. In *Martin* v. *Price* (2) the Court did not keep the parties waiting while making up their minds whether the view expressed in *Dreyfus* v. *Peruvian Guano Co.* (1) was to be established by decision, but, assuming the jurisdiction to exist, held upon the facts that an injunction ought to go. The only subsequent reference that I find to the point is in *Shelfer* v. *City of London Electric Lighting Co.* (3) In that case it was stated (correctly, so far as I know, although I have not verified it myself) that since Lord Cairns' Act was passed only fourteen cases were to be found in the books in which damages in lieu of an injunction have, against the will of the plaintiff, been awarded, and it was said that all these are cases in which mandatory injunctions were sought. The one case which I have found in which damages were given instead of a prohibitory injunction is *Holland* v. *Worley* (4), before Pearson J., a decision which has been doubted.

Under these circumstances I might deal with this case upon the footing that the expression of opinion in the Court of Appeal in *Dreyfus* v. *Peruvian Guano Co.* (1) ought, so far as I am concerned, to be treated as concluding the matter, and, if so, the injunction ought to go. But without resting my judgment wholly upon that, I think that for other reasons which I proceed to state an injunction ought equally to go.

An easement of light is a legal right. It is a matter of property, and, to quote the well-known words of Lord Kingsdown in *Imperial Gas Light and Coke Co.* v. *Broadbent* (5), when the plaintiff has established his legal right, then, "unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation." The plaintiffs' easement of light is a right at common law. The

(1) 43 Ch. D. 316.
(2) [1894] 1 Ch. 276.
(3) [1895] 1 Ch. 287, 315.
(4) (1884) 26 Ch. D. 578.
(5) (1859) 7 H. L. C. 600, 612.

remedy in equity by way of injunction is a remedy in aid of that legal right. The plaintiff is entitled to an injunction, not in the discretion of the Court, but as of course, unless there is something special in the case such as laches, or that the interference with the right is only trivial or occasional. To quote Lindley L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (1), "without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances." See, further, *Martin* v. *Price* (2); *Home and Colonial Stores* v. *Colls.* (3) The Court has affirmed over and over again that the jurisdiction to give damages where it exists is not so to be used as in fact to enable the defendant to purchase from the plaintiff against his will his legal right to the easement: see, for example, *Dent* v. *Auction Mart Co.* (4); *Aynsley* v. *Glover* (5); *Smith* v. *Smith* (6); *Greenwood* v. *Hornsey.* (7) This may be summed up in the language of Lindley L.J., in *Shelfer* v. *City of London Electric Lighting Co.* (8) thus: "ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrong-doer is able and willing to pay for the injury he may inflict." To refuse to aid the legal right by injunction and to give damages instead is in fact to compel the plaintiff to part with his easement for money. The Court has no right to compel him so to do: see Lord Halsbury's words in *Shelfer* v. *City of London Electric Lighting Co.* (9) If the injury be trivial and the damages would be measured by a very small sum, say, 20*l.*—*Dent* v. *Auction Mart Co.* (4); *Aynsley* v. *Glover* (5)—or 5*l.* or 6*l.*—*Home and Colonial Stores* v. *Colls* (10) —the Court may, where there is jurisdiction, give damages

(1) [1895] 1 Ch. 316.
(2) [1894] 1 Ch. 276, 285.
(3) [1902] 1 Ch. 302, 309.
(4) (1866) L. R. 2 Eq. 238, 246.
(5) (1874) L. R. 18 Eq. 544, 552.
(6) (1875) L. R. 20 Eq. 500, 505.
(7) (1886) 33 Ch. D. 471, 477.
(8) [1895] 1 Ch. 315.
(9) Ibid. 311.
(10) [1902] 1 Ch. 306.

BUCKLEY J. 1903 COWPER v. LAIDLER.

instead of an injunction. But except in such cases the owner of the legal right is entitled to the injunction, which is but the equitable remedy to perfect his right.

In the present case the circumstances upon which the defendant relies are, in substance, that his property in Northumberland Street and the lofty buildings which he proposes to put upon it are much more valuable than the comparatively insignificant cottage property at the back; that the plaintiff purchased the cottage property, or the last few shares in it, recently because, as the defendant suggests, he knew it would become very valuable and command a high price when the frontager in Northumberland Street wanted to interfere with its easement of light. The defendant has given no evidence that, and does not, I think, suggest that the damage will be 20*l.* or any small sum of that kind. I find that the damage will be substantial. The defendant says that the cottage property as such is worth a comparatively small sum, say 700*l.*; but it appears that when the immediate predecessor in title of the defendant contemplated building he offered the plaintiff a fancy price, 5000*l.*, for this property, and that the plaintiff refused it. The defendant says that the plaintiff is extorting money by asking for an injunction, and thus compelling the defendant either to buy at an unreasonable price or to keep his buildings down. This argument, I think, rests on a fallacy. It is not extortion to ask a price which a property for exceptional reasons in fact commands. If a neighbouring owner for the improvement of his property requires an adjacent property he must submit to pay a fancy price if he is determined to acquire it. The value of the adjacent property is in fact the greater by reason of that state of things. Moreover, when the defendant bought, as he did recently, subject to this easement of light existing as an hindrance to a building scheme, he probably paid less for his property than if there had not been such existing hindrance. Further, the value of the plaintiff's property is not merely the value of the old cottage, but is such sum as it will fetch, having regard amongst other things to this existing right to an easement of light. It is not, I think, extortion or oppression that the plaintiff should decline to sell his property

except for such price as having regard to the exigencies of the neighbouring property it will in fact command. It is no more oppressive in the plaintiff to say that he wants the full sum which his property will command having regard to the existing easement than it is in the defendant to say that he must be allowed to build in disregard of the easement. Assuming, therefore, without deciding that there exists in the present case (where the injury is not committed, but only threatened) jurisdiction to give damages in lieu of an injunction, I am of opinion that this is not a case in which that course ought to be taken. I think the plaintiff is entitled to an injunction; and I therefore grant an injunction in the usual form to restrain the defendant from erecting any building so as to obstruct the light heretofore enjoyed by the two windows which I have described. The plaintiff further relied upon a skylight in the roof of the cottage. The evidence was insufficient to enable me to determine, and I think it unnecessary to determine, whether this is an ancient light or not. In any case it would be less obstructed than the two windows, as to which I grant the injunction. The injunction which protects the latter will also protect the former, supposing it to be ancient.

I grant the above injunction. I dismiss the action as regards the disputed room, and the roof above and the soil under it. The rest of the relief which was asked by the statement of claim has not been asked for at the bar. I make no order as to costs.

Solicitors: *Rowcliffes, Rawle & Co., for Cooper & Goodger, Newcastle-upon-Tyne; Crossman, Prichard, Crossman & Block, for Dees & Thompson, Newcastle-upon-Tyne.*

H. C. R.

JOYCE J.

1902

Dec. 3, 4, 5, 8, 9, 10.

1903

Feb. 26.

BROCKLEBANK *v.* THOMPSON.

[1901 B. 3563.]

Customary Churchway—Manorial Custom—Evidence—Inhabitants of Parish at large.

There may be a lawful and valid custom for the inhabitants of a parish to have a churchway through the demesne of a manor which is within the parish. Primâ facie a custom in reference to a churchway is a parochial custom.

The plaintiff was lord of the manor of I. and also of the manor of S., both within the parish of I. The defendant was the occupier of a tenement in the same parish, but in the manor of S. Across the demesne of the manor of I. was a footpath which ran in front of the plaintiff's mansion-house to the parish church, and the defendant claimed the right to use it as an inhabitant of the parish for the purpose of going to and from the church. In an action of trespass against the defendant, the plaintiff alleged that the path was not a churchway for the parishioners generally, but only by virtue of a manorial custom of the manor of I. for a certain class of the tenants of that manor, and in support of that contention tendered in evidence a memorandum made by one of his predecessors in title:—

Held, (1.) on the evidence, that no such manorial custom existed; (2.) that, if proved, it was doubtful whether it would be good in law; (3.) that the memorandum was not admissible in evidence on behalf of the plaintiff; and (4.) that the path was a churchway by custom for the inhabitants of the parish at large.

TRIAL OF ACTION.

The plaintiff in this action was the owner of the Irton Hall estate in Cumberland, having acquired it by purchase in 1895. It comprised about two thousand acres, including the mansion-house, known as Irton Hall, with the manors, or reputed manors, of Irton and Santon.

Irton was an extensive parish and comprised these two manors. The parish church, which occupied the site of an earlier one said to date from the eighth century, was situate in the midst of fields with formerly no public road to or by it or the adjacent churchyard. The church and churchyard were within the manor of Irton and surrounded on every side by lands of that manor. They were situate about half a mile to the west

of Irton Hall, the plaintiff's mansion-house. The lands in the manor of Santon did not lie all together. The most eastern part of the parish belonged to the manor of Santon, but was detached from the rest of that manor.

The defendant was a tenant farmer in the parish of Irton, occupying Burnt House Farm, which was within the manor of Santon, a considerable distance to the north of Irton Hall, and about three miles from the church. Burnt House Farm was not the property of the plaintiff.

The action was for an injunction to restrain the defendant from trespassing upon a footpath, which ran from a point on a high road lying to the east of the hall, across the plaintiff's park, about seventy yards in front of the Hall, and terminated at the church. This path is hereinafter referred to as the disputed way.

Since the purchase of the Irton Hall estate by the plaintiff, litigation had taken place with reference to certain footpaths and roads over the property, and an action was instituted by the district council of Bootle, within whose district the property lay, against the present plaintiff to have it determined whether certain ways over the estate, including the disputed way, were public or private. That action was tried at the assizes held at Carlisle in 1899, and resulted in a compromise, a consent judgment being taken whereby certain of the ways then in question were in effect adjudged to be public, and certain other ways, including the disputed way, were in effect declared to be not public ways. It was contended in that action, on behalf of the present plaintiff, that the disputed way was merely a churchway. After the termination of that action the plaintiff attempted to close the disputed way by obstructing it at the point where it entered the park, and, the defendant having asserted his right and attempted to use the way for the purpose of going to church, the present action was brought. The defendant alleged by his defence that the inhabitants of the parish of Irton had by custom from time immemorial, or alternatively for the full period of forty years, or alternatively for the full period of twenty years next before action brought, as of right and without interruption, at their own free will and

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pleasure, used, and were entitled to use, the disputed way as a churchway, for themselves, their families, guests, and servants, for passing on foot to and from the parish church of Irton. By way of counter-claim he asked for an injunction to restrain the plaintiff from obstructing or allowing to remain obstructed the disputed way or any part thereof, and otherwise disturbing the defendant in the exercise or enjoyment of his right to use the disputed way as a churchway.

The plaintiff now contended that although the disputed way might be a churchway, yet it was not a churchway for the parishioners at large, but only by virtue of a manorial custom of the manor of Irton, for a limited class of the tenants of that manor. He tendered as evidence in support of that contention (inter alia) an old manuscript volume containing the following entry signed by a former owner of Irton Hall: "About 1763 soon after I came to the estate I called it at three or four churches that there was no road through the demesne but to the Hall and the mill and the tenants above wall to church which I hope will be remembered for the good of the family." It was not proved, however, who were the "tenants above wall" mentioned in this entry.

A large number of witnesses were called to prove user of the disputed way by the inhabitants of the parish of Irton going on foot to or from their parish church, and the result of this evidence is stated in the judgment of the Court.

Sir R. T. Reid, K.C., Hughes, K.C., and *O. L. Clare*, for the plaintiff. The admission, if any were made, at the trial at Carlisle, that the disputed way was a church road, does not go to this, that it is a church road for the parishioners at large. It has always been the plaintiff's case that the right was limited to a certain class of tenants of the manor. There is, therefore, no difficulty arising out of the admission that the disputed way was a churchway. In order to establish the right of way claimed by the defendant in this case, continuous enjoyment is necessary, and that has not been proved: *Hollins* v. *Verney* (1); *Seddon* v. *Bank of Bolton*. (2) Further, this right

(1) (1884) 13 Q. B. D. 304, 315. (2) (1882) 19 Ch. D. 462.

is claimed for all the inhabitants of the parish, and, that being so, s. 2 of the Prescription Act has no application. This is borne out by sub-ss. 4 and 5, which imply that the right must be exercised in connection with some known tenement: Gale on Easements, 7th ed. p. 12; *Rangeley* v. *Midland Ry. Co.* (1); *Mounsey* v. *Ismay*. (2) A multitude of persons can allege a custom, but they cannot prescribe. We admit that there may be by custom a right for all the inhabitants of the parish to have a particular way to church; but a custom must have certainty. There cannot be a custom for an uncertain portion of the inhabitants to use a particular way. We suggest a customary manorial right for the tenants of Irton Manor above wall to go to church by this way. A churchway is not necessarily used as a way for all the inhabitants to go to church. There are references in the court rolls to various churchways, but they all relate to ways for certain particular tenants of the manor to go to church; and the word churchway is obviously not used in the court rolls in the sense of a way for all the parishioners to go to church. There cannot be a dedication from user of a way to all the inhabitants of a particular parish; the dedication must be to the public generally: *Poole* v. *Huskinson*. (3) The witnesses looked upon this way as a public way. They were asserting a public right of way for all purposes.

Cripps, K.C., Younger, K.C., and *R. J. Parker*, for the defendant. A public way is not here in question. What then is the nature of a churchway? The distinction between a church road and a public right of way is clearly shewn in *Thrower's Case*. (4) It was there held that although an indictment would lie when a public way was out of repair, yet it would not lie in the case of a church road, because there was no right of user by the public generally, there being only a right of a particular customary kind limited to the parishioners of a particular parish. The authorities on this point are all summarized in Gale on Easements, 7th ed. p. 304. There is no case of any churchway in which there is any suggestion of

(1) (1868) L. R. 3 Ch. 306, 311.
(2) (1865) 3 H. & C. 486.
(3) (1843) 11 M. & W. 827.
(4) (1671) 1 Vent. 208.

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a limitation short of the inhabitants of the parish. We say that there is here a customary right vested in the inhabitants of the parish to go to this church by a particular way. Nothing else is known in connection with a churchway. It implies a customary right of user by the parishioners at large for church purposes. There is no evidence that this church road was a manorial road or had a manorial origin; there is no evidence of any such manorial right as has been suggested. The evidence shews that there has been a continuous user within legal memory of this church road by the parishioners at large for church purposes.

Cur. adv. vult.

Feb. 26. JOYCE J. (after stating the facts). It is well settled that by custom (for the inhabitants of a place being unincorporated could not take by grant) a local public or class of persons, as the inhabitants of a parish, may be entitled to have some use or quasi easement of land, as to have a way to a church or market: *Gateward's Case* (1); Co. Litt. 110 b.; *Goodday* v. *Michell* (2), and generally the note on p. 304 to 7th edition of Gale on Easements. But an indictment will not lie for the obstruction of such a churchway, because it is in law a private and not a public way, and there are other distinctions, in particular that any one of the parishioners may have an action for nuisance therein without shewing special damage.

[His Lordship then stated the facts with respect to the action tried at Carlisle, and continued:—]

It appears to me that upon the very serious occasion of that trial there was a distinct and deliberate admission, or rather persistent assertion, on behalf of the present plaintiff, then a defendant, that the several paths in question (including, and in particular the disputed way, the subject of the present action) were churchways for the use of the parishioners. The rural district council asserted that they were public ways, and it was between these two contentions that the jury was directed to decide. But they disagreed, except as to one path, which

(1) (1606) 6 Rep. 59 b. (2) (1595) Cro. Eliz. 441.

was not the disputed way, and was of no importance in reference to the present action. Negotiations then took place between the parties to that action, and ultimately a compromise was arrived at, a consent judgment being drawn up dated June 17, 1899, whereby it was adjudged that judgment be for the plaintiffs (the district council) with respect to three footways therein specified, and that judgment be for the defendants (of which the present plaintiff was one) with respect to certain other footways, one of such footways being the disputed way in this action.

The legal effect, as I understand it, of this judgment, so far as now material, would seem to be that the disputed way is not a public way. There is no express judgment that it is a private way. Although, of course, it is not certain, still I consider it to be by no means impossible that but for the course taken at Carlisle by the counsel of the then defendant, and now plaintiff, and their assertion on his behalf that the ways in question were churchways for the use of the parishioners, thus explaining the evidence of user, the trial might have resulted in the roads in question, and in particular the disputed way, being held to be public ways. Now, notwithstanding the assertion made, as I think, not unwisely, and I doubt not deliberately and advisedly by the counsel of the present plaintiff at the trial at Carlisle, the plaintiff by his pleadings in this action denies that there is any right to the use of the disputed way as a churchway, and pleads alternatively that, if any of the inhabitants of the parish have so used it, this has been by virtue of the leave or revocable licence of the owners of the Irton Hall estate. This last, or alternative, ground of defence was not very seriously insisted upon before me. Indeed, it could not well be urged under the circumstances. For in an action by the present plaintiff against one Shepherd the statement of claim, delivered January 5, 1898, contains the following averment with respect to the disputed way: "The said road is subject to a right of the tenants of the said manor of Irton, being parishioners of and occupiers of land in the parish of Irton to the north of Irton Hall aforesaid, to pass and repass on foot only over and along the said road

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to and from the said parish church, and which is the parish church of the said parish of Irton, for the purpose of attending services thereat, and to carry on foot bodies for burial in the churchyard of the said church, but for no other purpose, and is not subject to any public right of way." That action proceeded to judgment without any amendment of the statement of claim.

In my opinion, the result of the evidence adduced before me is, and I find as a fact, that the disputed way has been used as of right for as long back as living memory extends—much more than twenty years before the commencement of this action—by the inhabitants of the parish of Irton going on foot to or from their parish church, and that without any restriction or distinction in reference to the part of the parish in which they dwelt, or from which they came, or to which they were intending to return. In my opinion, this is an instance of a church path by custom for the inhabitants of the parish. Rights, or alleged rights, which have been long enjoyed are deemed to have had a legal origin, if such be possible, which, in the absence of proof that it is modern, is deemed to have commenced beyond legal memory: *Johnson* v. *Barnes* (1), *Philipps* v. *Halliday* (2), and numerous other cases. A regular usage of twenty years unexplained and uncontradicted is sufficient to warrant a jury in finding the existence of an immemorial custom: *Rex* v. *Joliffe*. (3) And from such modern usage, unless the contrary appear, the jury ought to presume the immemorial existence of the right: *Jenkins* v. *Harvey* (4); see also *Earl de la Warr* v. *Miles*. (5)

It is quite true that some of the defendant's witnesses in cross-examination expressed their individual opinion that the disputed way was a public way, for no doubt it has been occasionally used on week-days as well as on Sunday, and it was contended that this circumstance invalidated altogether the effect of the evidence of user as a churchway. I am of

(1) (1872) L. R. 7 C. P. 592; (1873) L. R. 8 C. P. 527.
(2) [1891] A. C. 228, 231.
(3) (1823) 2 B. & C. 54; 26 R. R. 264.
(4) (1835) 1 C. M. & R. 877, 895; 40 R. R. 769.
(5) (1881) 17 Ch. D. 535.

opinion that there is little or nothing in this argument in a case where it is certain, and indeed cannot seriously be denied by the plaintiff, that there was and is some legal right of way along the disputed path, and where the only real question, if there be a question, is as to the extent of that right and the limit, if any, of the class of persons entitled to exercise it. What more probable or natural than that in a thinly populated country district where there was an obvious and palpable footpath with a legal right of user by the parishioners for certain purposes, not perhaps very well defined in people's minds, there should have been an occasional user by other persons, or for purposes not strictly within the limited legal right?

But the principal, and, indeed, I think I may say the only, serious contention on the part of the plaintiff before me has been, that even if the disputed way be a churchway, it is not a churchway for the parishioners generally, but only by virtue of a manorial custom of the manor of Irton for the occupiers of a limited number of tenements in that manor, which tenements, however, cannot now be specified or identified. Of this contention I have not been able to find any trace in the pleadings in this action. It was admitted on behalf of the plaintiff that the boundary between the two manors cannot be traced, and that as to many lands in the parish it is impossible to determine to which manor they belonged.

The theory that the right to use the disputed way as a churchway is confined to a certain, or, rather, an uncertain, section of the inhabitants of the manor of Irton—a class which would not include the defendant—was publicly propounded, I believe, for the first time at the trial before me, though I have mentioned the statement made by the plaintiff upon this subject in his statement of claim in the action against Shepherd. No such theory was suggested at Carlisle. At the trial there it would have militated seriously against the contention urged on behalf of the present plaintiff. It appears to rest, so far as it can be said to have any foundation, upon the authority of something which has been discovered in an old manuscript volume containing an inventory of the furniture

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at Irton Hall—some observations upon the ancient history of the family of Irton, and other miscellaneous matters. It is no doubt in the handwriting of Samuel Irton, who held the Irton Hall estate from some time in the year 1762 until the year 1766. It is in the possession of a Mrs. Ryder, and is in the following terms: "About 1763 soon after I came to the estate I called it at three or four churches that there was no road through the demesne but to the Hall and the mill and the tenants above wall to church which I hope will be remembered for the good of the family." (Signed) "Samuel Irton." At the date of this entry Samuel Irton, the writer, was, as I have said, the owner of Irton Hall with the demesne, and also of both of the manors, or reputed manors, of Santon and Irton. He was the plaintiff's predecessor in title, and no doubt in possession of the demesne of Irton Hall. This entry was tendered in evidence on behalf of the plaintiff, and I think (though this was not very clearly stated) as a declaration of reputation concerning a question of alleged public or quasi public right. I have great difficulty in seeing how it amounts to such a declaration. Taken strictly, it simply asserts a fact, namely, that the writer had a certain notice given or published about the year 1763; but of this matter of fact—if fact it be—such a memorandum cannot possibly be evidence. Again, this entry does not purport to be an expression of the common opinion and report, or to state any general conclusion. It is not a declaration of the concurring opinion of others, but, if anything, at the very utmost only a statement by the person most interested denying or disputing the existence of a right in any but the "tenants above wall" (whatever may be the meaning of that expression) to a churchway through the demesne. It was a private statement, privately kept—not like something to which all persons interested had access, or which was generally recognised as a record. There is no evidence that until shortly before the trial at Carlisle this entry or memorandum had ever been seen or referred to by any one since it was made. Now a person cannot by a declaration make evidence to be used for himself, or for his successors after his decease. If this be a declaration at all, it was made

by a person whose mind could not be free from bias; and I am not aware that any case is to be found in which the declaration of a deceased person, obviously for his own interest, has been received in evidence: see *Plant* v. *Taylor*. (1) For the reasons I have indicated, I have come to the conclusion that this memorandum is not admissible in evidence on behalf of the plaintiff in this action.

I have already stated my view of the result of the evidence, and I repeat that, apart from the entry in this book—assuming the disputed way to be a churchway—there is not, upon the evidence, any ground for contending that the use of the path in question was, or has been at any time, limited to any particular class of the parishioners. Until August 25, 1901, no one passing along it for the purpose of attending the parish church has been stopped or interfered with in the use of the disputed way. It has been available for, and has been used by, all inhabitants of Santon, as well as all inhabitants of Irton who may have found it convenient, or have been minded to go to or return from church by that route, although all the parishioners to the south of Irton Hall had a much nearer way, which they would actually use in preference to the disputed way. Moreover, there is no doubt that corpses have been carried along the disputed way for burial in the churchyard, as shewn by the evidence in this action, and as mentioned by the plaintiff in his statement of claim in his action against Shepherd. Further, in my opinion it is at least doubtful whether a usage, if proved, for the tenants of certain particular tenements in the manor of Irton, and those tenements only, to use the disputed way as a church path would be a good custom in law, those tenements not forming a definite and distinct district known to the law as a manor or hamlet: see *Edwards* v. *Jenkins*. (2) Any particular tenement or tenements in the manor of Irton might be entitled to such a right of way by prescription, if tenants were permitted to prescribe against their lord, which, however, is well known not to be the case.

As appears from what I have already stated, every part of

(1) (1861) 7 H. & N. 211. (2) [1896] 1 Ch. 308.

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the manor of Santon was cut off from the parish church and churchyard by intervening lands of the manor of Irton; and there seems to be an idea on the part of the plaintiff's advisers that the inhabitants of Santon were entitled to use as a churchway a road or path going westwards from the church over a part of Irton Manor by Stockbridge into the manor, or rather part of the manor, of Santon, and that this was the customary and only lawful way to and from church for any of the inhabitants of the manor of Santon, including the defendant. In my opinion there is no evidence that the inhabitants of Santon were ever in fact restricted to the use of this western path by Stockbridge as their customary churchway, so that those in the neighbourhood of Burnt House would be bound to go round as much as half a mile further than they would have to go if they proceeded by the churchway on the east—that is, the disputed way. Indeed, if I rightly understand the authorities, there cannot be a custom in one place giving any right in another place: see per Lord Ellenborough in *Rex* v. *Inhabitants of Ecclesfield* (1), per Littledale J. in *Blewett* v. *Tregonning* (2), and *Sowerby* v. *Coleman*. (3) A custom claimed on behalf of the inhabitants of the manor of Santon to have a right of way to church within the manor of Irton would not, I think, be a good manorial custom of either manor. But there might well be a lawful and valid custom of the parish of Irton for the inhabitants thereof to have a churchway or path through the demesne of Irton which is within the parish. Indeed, it is not easy to see how, in the absence of some such parochial custom, the inhabitants of Santon could formerly, having regard to the situation of that manor, get to their parish church at all. Primâ facie a custom in reference to a way to a parish church would be a parochial custom for the parishioners, and, so far as I am aware, no mention is to be found in any reported case, or, in fact, in any law book, of a customary churchway not for the use and benefit of the parishioners at large.

It is not necessary for me to consider an alternative claim

(1) (1818) 1 B. & Al. 348, 360; 19 R. R. 335.

(2) (1835) 3 Ad. & E. 554, 572; 42 R. R. 463.

(3) (1867) L. R. 2 Ex. 96.

of the defendant to a right of way by prescription taking the view which I do of the result of the evidence, for I hold that the contention put forward on behalf of the present plaintiff by his counsel at Carlisle, as I understand it, was well founded in fact, and that the disputed way was and is by immemorial custom a churchway or path for the inhabitants generally of the parish of Irton. This being so, the action must be dismissed.

On the counter-claim there will be judgment for 1*s.* damages and costs, and an order to restrain the plaintiff from disturbing Thompson and his family, guests or servants, in the exercise or enjoyment of their right to use the pathway as a churchway. With regard to the mandatory injunction asked for, namely, an injunction to restrain the plaintiff, his agents, servants, and workmen from allowing the pathway to remain obstructed, I at the trial intimated that I felt some difficulty. What was in my mind, among other things, was that the Attorney-General was not here. But the result of further consideration of the cases is that no doubt the statement in Leake on the Uses and Profits of Land, p. 550, is perfectly true. "An indictment does not lie on behalf of a class or section of the public for an obstruction of a local right, which does not affect the public in general" (that is what this is), "and therefore the only remedy is by action which any person who is within the custom may bring in respect of his interest in the right" (and I may add in respect also of the obstruction of his legal right) "irrespective of special or particular damage sustained by him individually." In fact, I think that was done in *Harrop* v. *Hirst.* (1) Taking the view which I do of this case, if the defendant presses for it, I think he is entitled to a mandatory injunction. I do not propose, however, to grant it now; but I give him liberty to apply, if so advised, for a mandatory injunction.

Solicitors for plaintiff: *Harrison & Powell, for Brown, Auld & Brown, Whitehaven.*

Solicitors for defendant: *Rowcliffes, Rawle & Co., for Musgrave & McKelvie, Whitehaven.*

(1) (1868) L. R. 4 Ex. 43.

JOYCE J.
1903
April 22, 24;
May 2.

In re OATWAY.
HERTSLET *v.* OATWAY.

[1902 O. 273.]

Trustee—Breach of Trust—Following Trust Money—Banking Account—Mixed Fund—Investment—Appropriation of Payments.

Where a trustee paid trust money into his banking account whereby it became mixed with his own money, and out of moneys drawn from the account purchased an investment in his own name, but subsequently applied the balance to his own purposes, his representatives cannot successfully maintain that the investment was purchased out of the trustee's own money, and that what has been spent, and can no longer be traced and recovered, was the money belonging to the trust.

Brown v. *Adams*, (1869) L. R. 4 Ch. 764, is overruled by *In re Hallett's Estate*, (1880) 13 Ch. D. 696.

THIS was a creditor's action for the administration of the estate of Lewis John Oatway, a solicitor, who died insolvent in 1902. The defendant Christiana Mary Oatway was his sole executrix. In the course of the administration a question arose as to the title to a sum of 2474*l.* 19*s.*, being the proceeds of sale of 1000 shares in a company called the Oceana Company, which at the date of the testator's death were standing in his name.

The testator and one Maxwell Skipper were co-trustees under the will of Charles Skipper, deceased. In 1899 and 1900 sums amounting to 3000*l.* were advanced in breach of trust out of Charles Skipper's estate to Maxwell Skipper upon the security of a mortgage of an undivided share of certain real estate to which he was entitled under his grandfather's will. In 1901 Maxwell Skipper went abroad, having given to Oatway a power of attorney under which and as mortgagee he on August 15, 1901, sold Maxwell Skipper's reversionary interest for the sum of 7000*l.* This sum Oatway paid into his own banking account, which at that time was in credit to the extent of 77*l.* 13*s.* 4*d.* He did not replace the 3000*l.* which had been advanced to Maxwell Skipper out of Charles Skipper's trust estate.

On August 15, 1901, Maxwell Skipper was indebted to

Oatway in the sum of 1779*l.* 7*s.* 1*d.*, and also in a further unascertained amount in respect of costs.

On August 24, 1901, Oatway purchased the Oceana shares for 2137*l.* 12*s.* 3*d.*, which he paid for by a cheque on his banking account. Before the purchase of the shares Oatway had made further payments into the account to the extent of 30*l.* 1*s.* 11*d.*, and had drawn out sums amounting to 510*l.* 8*s.* 6*d.*; so that when he drew the cheque for 2137*l.* 12*s.* 3*d.* in payment for the shares the credit balance of his account was 6635*l.* 6*s.* 4*d.*, which sum included the 3000*l.* belonging to the estate of Charles Skipper.

After paying for the shares, Oatway paid further sums into the account, but his subsequent drawings for his own purposes exhausted the whole amount standing to his credit, and there was nothing to represent the 3000*l.* except the proceeds of the Oceana shares.

This was a summons taken out by Maxwell Skipper, who was also a defendant to the action, asking that the sum of 2474*l.* 19*s.*, being the proceeds of the Oceana shares, might be paid to him either in his personal capacity or as trustee under the will of Charles Skipper.

Austen-Cartmell, for the applicant. Oatway was bound when he received the 7000*l.* to replace the 3000*l.*, which, in breach of trust, had been advanced to Maxwell Skipper out of Charles Skipper's estate. He then had to account to Maxwell Skipper for the balance of the 7000*l.* The whole of the 7000*l.* having disappeared except that which can be traced into the Oceana shares, the proceeds of those shares clearly belong to the applicant either personally or as trustee.

In a case of this sort the second part of the holding in *In re Hallett's Estate* (1) does not apply. It cannot be said that the shares were bought by Oatway out of his own money, and that therefore he is entitled to hold them as against the beneficiaries under Charles Skipper's will. Where a trustee has mixed trust money with his own and has purchased land or chattels out of the mixed fund, the beneficial owner can

(1) 13 Ch. D. 696.

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follow the trust money and is entitled to a charge on the purchased property: *In re Hallett's Estate.* (1) The applicant does not desire to press his personal claim to the proceeds of the shares, provided that the Skipper trust gets the benefit of them; but he submits that he is entitled to recover against Oatway's estate.

Younger, K.C., and *Ashworth James*, for the plaintiffs, who were beneficiaries under Charles Skipper's will. The proceeds of the Oceana shares clearly belong to the Skipper trust.

Dibdin, K.C., *A. Whitaker*, and *Crossfield*, for the defendant Christiana Mary Oatway. When Oatway bought the shares the balance to his credit at the bank was sufficient to enable him to pay for them apart from the 3000*l.* trust money. The proceeds of the shares belong to Oatway's estate. It was his own money which he drew out to pay for them. He was entitled as against Maxwell Skipper to do that: *In re Hallett's Estate.* (1)

Cur. adv. vult.

May 2. JOYCE J. Oatway was co-trustee with Maxwell Skipper of the will of Charles Skipper, the father of the latter. In breach of trust 3000*l.* was advanced from the trust to Maxwell Skipper upon the security of a mortgage given by him to Oatway alone. Oatway, as mortgagee, and under a power of attorney from Maxwell Skipper, sold the mortgaged property, and as mortgagee received and gave a receipt for the 3000*l.* trust money, part of the proceeds of sale, which amounted to 7000*l.* The rest he received as agent of or on behalf of Maxwell Skipper, from whom he held a power of attorney. Oatway, instead of investing the 3000*l.* upon proper trust securities in the joint names of himself and Maxwell Skipper, the trustees, paid in the whole 7000*l.* on August 15, 1901, to his own banking account, which was then in credit to the amount of 77*l.* 13*s.* 4*d.* Between August 15 and 24 he paid in sums amounting to 30*l.* and drew out 510*l.*, which he paid away to creditors or otherwise applied to his own purposes in such a manner as to be irrecoverable.

(1) 13 Ch. D. 696.

On August 24, out of the balance to the credit of the account, Oatway paid 2137*l.* 12*s.* 3*d.* for the purchase of certain shares in the Oceana Company, which remained in his name at the time of his decease, and have since been sold by arrangement. It is the proceeds of these shares which is now in question. The balance to the credit of the account after this payment, with some other sums paid in from time to time by Oatway, was subsequently exhausted by his drawings on his own account.

The balance of the 7000*l.*, after discharging the mortgage, belonged to Maxwell Skipper, but it is alleged that Oatway as a creditor of his had claims thereon to a large amount. Maxwell Skipper, who was himself a party to the original breach of trust, could not under the circumstances, and in fact does not, oppose the claim of the trust to the proceeds of the Oceana shares. For the purposes of this case we may consider Oatway to have been entitled to the balance of the 7000*l.* after discharging the 3000*l.* mortgage.

There is no conflict between different fiduciary owners or sets of cestuis que trust. It is a principle settled as far back as the time of the Year Books that, 'whatever alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material:' see Blackstone, vol. ii. p. 405, and *Lupton* v. *White*. (1) But this rule is carried no farther than necessity requires, and is 'applied only to cases where the compound is such as to render it impossible to apportion the respective shares of the parties.' Thus, if the quality of the articles that are mixed be uniform, and the original quantities known, as in the case of so many pounds of trust money mixed with so many pounds of the trustee's own money, the person by whose act the confusion took place is still entitled to claim his proper quantity, but subject to the quantity of the other proprietor being first made good out of the whole mass: 2 Stephen's Commentaries (13th ed.), 20. Trust money may be followed into land or any other property in which it has been invested; and when a trustee has, in making

(1) (1808) 15 Ves. 432; 10 R. R. 94.

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any purchase or investment, applied trust money together with his own, the cestuis que trust are entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase or investment. Similarly, if money held by any person in a fiduciary capacity be paid into his own banking account, it may be followed by the equitable owner, who, as against the trustee, will have a charge for what belongs to him upon the balance to the credit of the account. If, then, the trustee pays in further sums, and from time to time draws out money by cheques, but leaves a balance to the credit of the account, it is settled that he is not entitled to have the rule in *Clayton's Case* (1) applied so as to maintain that the sums which have been drawn out and paid away so as to be incapable of being recovered represented pro tanto the trust money, and that the balance remaining is not trust money, but represents only his own moneys paid into the account. *Brown* v. *Adams* (2) to the contrary ought not to be followed since the decision in *In re Hallett's Estate.* (3) It is, in my opinion, equally clear that when any of the money drawn out has been invested, and the investment remains in the name or under the control of the trustee, the rest of the balance having been afterwards dissipated by him, he cannot maintain that the investment which remains represents his own money alone, and that what has been spent and can no longer be traced and recovered was the money belonging to the trust. In other words, when the private money of the trustee and that which he held in a fiduciary capacity have been mixed in the same banking account, from which various payments have from time to time been made, then, in order to determine to whom any remaining balance or any investment that may have been paid for out of the account ought to be deemed to belong, the trustee must be debited with all the sums that have been withdrawn and applied to his own use so as to be no longer recoverable, and the trust money in like manner be debited with any sums taken out and duly invested in the names of the proper trustees. The order of priority in

(1) (1816) 1 Mer. 572; 15 R. R. 161. (2) L. R. 4 Ch. 764.
(3) 13 Ch. D. 696.

which the various withdrawals and investments may have been respectively made is wholly immaterial. I have been referring, of course, to cases where there is only one fiduciary owner or set of cestuis que trust claiming whatever may be left as against the trustee. In the present case there is no balance left. The only investment or property remaining which represents any part of the mixed moneys paid into the banking account is the Oceana shares purchased for 2137*l.* Upon these, therefore, the trust had a charge for the 3000*l.* trust money paid into the account. That is to say, those shares and the proceeds thereof belong to the trust.

It was objected that the investment in the Oceana shares was made at a time when Oatway's own share of the balance to the credit of the account (if the whole had been then justly distributed) would have exceeded 2137*l.*, the price of the shares; that he was therefore entitled to withdraw that sum, and might rightly apply it for his own purposes; and that consequently the shares should be held to belong to his estate. To this I answer that he never was entitled to withdraw the 2137*l.* from the account, or, at all events, that he could not be entitled to take that sum from the account and hold it or the investment made therewith, freed from the charge in favour of the trust, unless or until the trust money paid into the account had been first restored, and the trust fund reinstated by due investment of the money in the joint names of the proper trustees, which never was done.

The investment by Oatway, in his own name, of the 2137*l.* in Oceana shares no more got rid of the claim or charge of the trust upon the money so invested, than would have been the case if he had drawn a cheque for 2137*l.* and simply placed and retained the amount in a drawer without further disposing of the money in any way. The proceeds of the Oceana shares must be held to belong to the trust funds under the will of which Oatway and Maxwell Skipper were the trustees.

Solicitors: *Fladgate & Co.; J. A. Bartrum.*

G. A. S.

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1903

May 16.

In re JENKINS AND H. E. RANDALL & CO.'S CONTRACT.

[1903 J. 150.]

Vendor and Purchaser—Title—Purchase of Land in Breach of Trust—Power of Trustee to sell.

B., the trustee of the will of his deceased wife, invested trust moneys in the purchase of a leasehold house, being an unauthorized investment. The persons beneficially entitled were two infants, who or the survivor of whom took the property if and when they attained twenty-one, and, in default of either attaining that age, the testatrix's next of kin. B. died, and his executors contracted to sell the house :—

Held, that as some of the beneficiaries were not capable of electing to take the property in its existing state, the executors could make a good title without the concurrence of any beneficiary.

ANNIE BURLEIGH by her will, dated July 3, 1899, appointed her husband Herbert Alfred Burleigh sole executor, and bequeathed to him a sum of 3000*l.* upon trust to invest the same in any investments authorized by law for trust funds, and gave the annual income of the said sum and the investments to her husband for life; and after his death she bequeathed the same sum of 3000*l.* to her nephews, William Salterley Bawdon and Robert Henry Bawdon, in equal shares; and she gave, devised, and bequeathed the residue of her real and personal estate to the same two nephews in equal shares. By a codicil dated December 6, 1899, the testatrix declared that her intention was that her said nephews should not have a vested interest in the said legacy of 3000*l.* and the residue of her real and personal estate until they attained twenty-one, she revoked the devise and bequest aforesaid, and gave the said sum of 3000*l.* after the death of her husband and all the residue of her real and personal estate to her said nephews in equal shares on their attaining the age of twenty-one years, and if only one of the said nephews should live to attain that age she gave the same wholly to the survivor, but if both should die under that age then she gave the said sum of 3000*l.* and the residue of her real and personal estate to the person or persons of the whole-

blood who would have been entitled thereto at her death if she had died intestate and without ever having been married or having any kindred of the half-blood. The testatrix died on December 30, 1899. Her husband proved her will and invested 2100*l.*, forming part of the legacy of 3000*l.* or of the residue, in the purchase of a leasehold house in Bristol, No. 62, Park Street, held for a term of 700 years from September 29, 1788, and he expended 400*l.* out of the same fund in repairs.

By his will dated July 31, 1900, Herbert Alfred Burleigh appointed F. A. Jenkins and William Jeffries executors. He died on September 20, 1901, and his will was duly proved by the executors therein named.

On October 29, 1902, the executors of H. A. Burleigh entered into a contract with H. E. Randall & Co., Limited, to sell the house, No. 62, Park Street, for 2600*l.* The purchasers made, among others, the following requisition.

It would seem that the purchase of the property by H. A. Burleigh out of trust funds was a breach of trust, in respect of which the cestuis que trust on attaining a vested interest can elect to follow the property. How is it proposed to get over this objection, seeing that the purchasers have notice of the breach of trust? The requisition was answered by pointing out that the trust estate had suffered no loss. A correspondence followed, in the course of which the vendors maintained that they could make a good title without the concurrence of any cestui que trust, but offered to obtain the concurrence in the conveyance of the testatrix's sister, who was one of her next of kin at her death.

The purchasers refused to accept this without an indemnity against any claim of the infants. The vendors then took out this summons under the Vendor and Purchaser Act, 1874, for a declaration that the purchasers' requisitions, so far as related to the power of the applicants to sell the same hereditaments, had been sufficiently answered, and that a good title had been shewn.

George Lawrence, for the vendors. The objection taken is that the infants, if they attain twenty-one, might elect to take

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the property as land. But the trustees can clearly make a good title unless all the cestuis que trust elect to take the property as land. This cannot be done, because the infants are incapable of electing. In the 6th edition of Dart's Vendors and Purchasers, p. 688, the law is stated thus: "And where there are several cestuis que trust, the concurrence of any one of them in the sale, or the personal incompetency of any one of them to elect to take the property as land, would render the sale valid, at any rate if the sum invested were realised; for the election to continue the property in its state of unauthorized investment must be the act of all." In *Power* v. *Banks* (1), which was decided since the passage in Dart was written, Cozens-Hardy J. says: "In the case of an unauthorized purchase by a trustee, I think the trustee can make a good title to a purchaser with notice, provided only that all the beneficiaries are not at once competent and desirous to take the land in specie." I submit that that statement covers the present case. *In re Patten and Edmonton Union* (2) decided that if one of the cestuis que trust joined in the conveyance a good title could be made. In *Robinson* v. *Robinson* (3) the leave of the Court was asked for and obtained.

J. M. Gover, for the purchasers. The passage from Cozen-Hardy J.'s judgment cannot be taken as laying down a general rule that the infancy of one cestui que trust enables the trustee to make a good title. The only authority is the passage in Dart, and no case is there cited to support the statement. It has been held that the right to elect is an equitable estate or interest in the property: *Cave* v. *Cave*. (4) The Court might elect on behalf of the infants; but, if it does not, the infants have a right to have their right of election preserved until they attain twenty-one. The interest of the next of kin is merely contingent—an election by one of them would not bind the property: *Sisson* v. *Giles*. (5) In *In re Patten and Edmonton Union* (2) the cestuis que trust had vested interests in possession as tenants in common. Here the titles both of the

(1) [1901] 2 Ch. 487, 496.
(2) (1883) 52 L. J. (Ch.) 787.
(3) (1876) Ir. R. 10 Eq. 189.
(4) (1880) 15 Ch. D. 639.
(5) (1863) 3 D. J. & S. 614.

infants and the next of kin are contingent, and they are alternative. The election of one of the next of kin might bind their interest in the event of their taking the property, but it could have no effect on the interest of the infants if either of them attained twenty-one: *Meek* v. *Devenish*. (1) The only way to make a good title would be to get the concurrence of one of each of the classes who are contingently entitled.

SWINFEN EADY J. The short question arising in this case is whether the concurrence of a beneficiary under the will of Mrs. Annie Burleigh is necessary to enable the legal personal representatives of her husband Herbert Alfred Burleigh to make a good title to the leasehold house they have contracted to sell. H. A. Burleigh was a trustee under his wife's will, and in breach of trust he invested part of the trust funds in the purchase of a leasehold house which was not an authorized investment. In fact it has turned out a beneficial investment. His executors have contracted to sell the house at a price which is 100*l.* more than the money he paid, including a sum which he spent in improvements after his purchase.

The beneficiaries under Mrs. Burleigh's will are her two infant nephews, who are contingently entitled in equal shares if they attain twenty-one, with benefit of survivorship if only one attains that age; and, in default of either of the infants attaining twenty-one, the testatrix's next of kin of the whole-blood. Mr. H. A. Burleigh is dead, and his executors have contracted to sell the house. It is said that the legal personal representatives of the deceased trustee are prevented from making a title, because all the beneficiaries together have a right to take the property as it is. They do not at present claim to exercise that right, for the persons entitled in one event are infants, and the next of kin who would be entitled in the other event have not, I believe, been ascertained. But it is said that a good title cannot be made unless some of the persons entitled in each event concur in the conveyance. I am of opinion that the legal personal representatives of the trustee, who are accountable in their representative capacity

(1) (1877) 6 Ch. D. 566.

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for the trust moneys which the testator improperly invested, are entitled to realize the investment, and that it is their duty to do so in order to ascertain what, if anything, is due from their testator's estate. Happily, in this case, the price agreed upon exceeds the amount due; but it might have been otherwise, and then it would have been their duty to ascertain what was due and make it good. In the case of *Power* v. *Banks* (1) Cozens-Hardy J. deals with the question. He says: "What, then, was the legal position when Mr. Insley" (the trustee) "purchased the land? He still remained accountable for the cash." That is the case here: the trustee's estate is still responsible.

In the case of an unauthorized purchase by a trustee, I am of opinion that the trustee can make a good title to a purchaser with notice, provided only that all the beneficiaries are not at once competent and desirous to take the land in specie: see *In re Patten and Edmonton Union.* (2) Here there was no beneficiary either competent or desirous to take the land in specie. The right of the trustee to sell cannot depend upon the question whether the entire amount of the trust fund or only a portion of it is cleared by the sale. He must have a right to sell in lots, and generally to realize the property as a prudent owner would. He is simply doing his duty by turning the property into cash so as to replace as far as may be the trust fund. The contrary view would prevent a trustee ever remedying a breach of trust of this nature without instituting a suit for this purpose, as was done in *Robinson* v. *Robinson.* (3) The executors in the present case can make a good title to the property, and the purchaser is not entitled to insist that any person beneficially entitled to an interest in the property shall concur in the conveyance.

Solicitors: *Meredith, Roberts & Mills, for Bobbett Brothers, Bristol; Crowders, Vizard & Oldham, for Dennis & Faulkner, Northampton.*

(1) [1901] 2 Ch. 496. (2) 52 L. J. (Ch.) 787.
(3) Ir. R. 10 Eq. 189.

J. R. B.

SWINFEN EADY J.

1903

June 9.

In re WARRINER. BRAYSHAW *v.* NINNIS.

[1902 W. 1068.]

Landlord and Tenant—Covenant—Impositions—Covenant by Tenant to pay—Three Years' Tenancy—Notice by Sanitary Authority to reconstruct Drains.

A landlord let a house to a tenant for three years at the "clear yearly rent" of 54*l.*, to be paid "free and clear of and from all deductions whatsoever," property tax excepted.

The tenant covenanted to pay the rent and to pay and discharge "all rates, taxes, assessments, and impositions whatsoever, whether parliamentary, parochial, or otherwise," that might become due or assessed in respect of the premises during the tenancy, property tax excepted, and to keep the premises in as good repair as at the commencement of the tenancy, fair wear and tear excepted.

The landlord covenanted to keep the main walls and roof in repair during the tenancy:—

Held, that the duty and expense of complying with a notice from the sanitary authority to reconstruct the drains constituted an "imposition" within the agreement which fell on the tenant notwithstanding the absence of such words as "imposed on the landlord or tenant," and notwithstanding the shortness of the tenancy:—

Foulger v. *Arding*, [1902] 1 K. B. 700, 710, and *Stockdale* v. *Ascherberg*, [1903] 1 K. B. 873, considered and applied.

CLAIM in administration action.

By an agreement under seal made on July 16, 1898, between Edmund Warriner, the landlord, of the one part, and Cecilia Grace Ellen Bradley, the tenant, of the other part, the landlord agreed to let a messuage known as 122, Shooter's Hill Road, Blackheath, with the premises and garden belonging thereto, to the tenant for a term of three years from September 29, 1898, at the "clear yearly rent" of 54*l.*, to be paid by even quarterly instalments on the usual quarter-days in each year "free and clear of and from all deductions whatsoever (property tax on the said rent only excepted)."

The tenant agreed to take the premises and to pay the rent at the times and in the manner specified, and to "pay and discharge all rates, taxes, assessments, and impositions whatsoever,

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whether parliamentary, parochial, or otherwise, that may become due or assessed in respect of the messuage premises and garden during the tenancy (property tax only excepted as aforesaid)," and to keep the messuage premises and garden in as good state, order, and condition and repair as at the commencement of the tenancy (fair wear and tear and accidental damage by fire in the meantime only excepted).

The landlord agreed to keep the main walls and roof of the premises in repair during the tenancy.

On February 20, 1899, the local sanitary authority, acting under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4, served notices on the landlord as owner and the tenant as occupier requiring them to abate and prevent the recurrence of a nuisance caused by structural defects in the drains, and for that purpose to execute the works therein specified. These works practically involved a reconstruction of the drains.

The tenant having communicated with the landlord, who relied on the agreement and repudiated any liability, executed the works at a cost of 118*l*.

The landlord died on February 24, 1902, insolvent, and his estate was being administered by the Court in the present action.

The tenant having carried in a claim as a creditor for the 118*l*., the point was referred to the judge before the certificate was made, on the understanding that there would be no motion to vary.

George Lawrence, for the tenant. As the nuisance was caused by structural defects, the notice should only have been served on the landlord under s. 4. In default of compliance with that notice the sanitary authority might have obtained a nuisance order, which, if not complied with, would have entitled them to do the work themselves and recover the expenses from the landlord. They might also have recovered them to the extent of the rent from the tenant under s. 121; but in that case the tenant, unless precluded by her contract, would have been entitled to deduct them from the rent. The

Act does not create any charge on the premises. The only question, therefore, is whether the agreement throws these expenses on the tenant. The words "duties" or "outgoings" might cover this liability, but the word "impositions" alone is insufficient: *Rawlins* v. *Briggs*. (1) It is true that in *Foulger* v. *Arding* (2) Romer L.J. considered that "duties" and "impositions" were practically synonymous, but in that case there was no covenant to repair, and the words were "impositions . . . . imposed . . . . on the landlord, tenant, or occupier." In *Rawlins* v. *Briggs* (1), which most nearly resembles the present case, great stress was laid on the absence of similar words. The numerous other cases on the point are summarized in the arguments in *Foulger* v. *Arding* (2), and it is unnecessary to refer to them separately. Again, in *Foulger* v. *Arding* (2) there was a sixteen years' lease. In the present case there is a three years' agreement, and it cannot have been intended that the tenant should be liable to pay a sum amounting to over two years' rent for the reconstruction of drains: *Valpy* v. *St. Leonards Wharf Co.* (3)

St. John Clerke, for the landlord's legal personal representative. There is no practical distinction between "duties" and "impositions": *Foulger* v. *Arding* (2); and the omission of the words "imposed on the landlord or tenant" is at the present day immaterial: *Brett* v. *Rogers* (4); *Farlow* v. *Stevenson*. (5) The shortness of the term is also immaterial, as the possibility of the landlord being called upon to put the drains in order cannot be regarded as outside the contemplation of the parties in the present case: *Stockdale* v. *Ascherberg*. (6) *Foulger* v. *Arding* (2) has been recently followed in *George* v. *Coates*. (7) [He also proposed to cite *Formby* v. *Lampel* (8) from the *Solicitors' Journal*, but the Court declined to refer to that report.]

SWINFEN EADY J. The question I have to determine is whether the tenant can prove against her landlord's estate for a

(1) (1878) 3 C. P. D. 368, 372.
(2) [1902] 1 K. B. 700, 710.
(3) (1903) 1 L. G. R. 305.
(4) [1897] 1 Q. B. 525.
(5) [1900] 1 Ch. 128.
(6) [1903] 1 K. B. 873.
(7) (1903) 88 L. T. 48.
(8) (1903) 47 Sol. J. 471.

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sum of 118*l.* expended by her on the reconstruction of drains in compliance with a notice from the sanitary authority. That question depends on the true construction of the agreement of tenancy. [His Lordship read the agreement, and continued:—] I am of opinion that the tenant is not entitled to recover. She covenanted to pay the rent "free and clear of and from all deductions whatsoever (property tax on the said rent only excepted)," and to "pay and discharge all rates, taxes, assessments, and impositions whatsoever, whether parliamentary, parochial, or otherwise, that may become due or assessed in respect of the messuage premises and garden during the tenancy (property tax only excepted as aforesaid)."

Now the obligation of repairing the drains in compliance with the notice served by the sanitary authority was a statutory duty imposed by the Public Health (London) Act, 1891. It is true that the agreement does not contain the word "duties." But in *Foulger* v. *Arding* (1) Romer L.J., in considering whether there was any distinction between a "duty" and an "imposition," said (2): "It appears to me that it would be a lamentable thing that the result of the authorities should be that, if a covenant of this kind speaks of 'duties imposed on the landlord or tenant in respect of the demised premises,' such an expense as that here in question must be borne by the tenant, but, if the covenant speaks of 'impositions charged or imposed on the landlord or tenant in respect of the demised premises,' then the tenant is not liable under it. It seems to me that such a distinction is one which we ought not to draw. The cases shew that a 'duty imposed' means a sum of money payable in respect of a duty imposed. What then is an 'imposition' within the meaning of this covenant? I should say, apart from authority, that in this covenant it means a sum of money payable by the landlord or tenant in respect of an imposition. A duty imposed appears to me to be an imposition, and I should say that the word 'imposition' is, if anything, rather larger than the word 'duty.'"

In my view the duty of complying with the notice from the sanitary authority and the payment of the costs of the neces-

(1) [1902] 1 K. B. 700. (2) [1902] 1 K. B. 710.

sary works constituted an "imposition" that became due in respect of the messuage premises and garden.

It was contended that the burden of an imposition primâ facie payable by the landlord only fell on the tenant in cases where the tenant expressly agreed to pay impositions "imposed on the landlord or tenant" in respect of the premises. But on an examination of the authorities it is clear that the burden has sometimes been held to fall on the tenant where those words were not used. The language is wide enough to include this imposition, and the repair of drains must have been within the reasonable contemplation of the parties.

This construction is assisted by a reference to s. 121. That section is not applicable in the present case, because the sanitary authority did not do the work themselves. If they do the work, they can recover the money from the person responsible for the nuisance; and s. 121 provides that any costs and expenses which are recoverable under this Act by a sanitary authority from an owner of premises may be recovered from the occupier for the time being of such premises; and the owner shall allow the occupier to deduct any money which he pays under this enactment out of the rent from time to time becoming due in respect of the premises, provided that (*a*) the occupier shall not be so required to pay any further sum than the amount of rent for the time being due from him, or which becomes payable after demand of such costs or expenses and notice not to pay any rent without first deducting the same, unless he refuses to disclose the amount of his rent and the name and address of the person to whom it is payable; and (*b*) nothing in this section shall affect any contract between any owner and occupier of any premises whereby the occupier agrees to pay or discharge all rates, dues, and sums of money payable in respect of such premises, or shall affect any contract whatsoever between landlord and tenant.

Now the words "rates, dues, and sums of money payable in respect of such premises" are not substantially different from the words in the present case. If, then, the sanitary authority had done the work and recovered the expenses from the occupier, and the occupier had then deducted the expenses from

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the rent, she would have been making a deduction that was not allowed by the terms of her contract.

As to the shortness of the term, the present case is not really distinguishable from *Stockdale* v. *Ascherberg*. (1) That was a case of a three years' tenancy, under which the tenant agreed to pay all "outgoings . . . . payable in respect of the premises." The agreement did not contain the words "payable by the landlord or tenant"; but it was held that, notwithstanding the shortness of the term, the tenant was liable to recoup the landlord for the cost of certain drainage work executed by him in compliance with a notice from the sanitary authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55).

The claim therefore fails.

Solicitors: *Frederick Kinch; W. J. & E. H. Tremellen.*

(1) [1903] 1 K. B. 873.

G. R. A.

In re IBO INVESTMENT COMPANY.

C. A. 1903 May 13, 29.

[00267 of 1902.]

Company—Winding-up Petition—Practice—Costs—Appeal—Costs of Contributories and Creditors supporting Successful Party.

Where an appeal is brought against the decision of the Court of first instance upon a winding-up petition, and by the order of the Court below those contributories or creditors who have supported the successful party have been allowed one set of costs between them in accordance with the settled practice, if the appellant does not seek to disturb that part of the order, his proper course is not to serve such contributories or creditors with notice of the appeal, but to inform them by letter of the pendency of the appeal and of his intention not to ask for a reversal or modification of the order of the Court below so far as it deals with their costs, and then, if they think fit to appear upon the appeal and the appeal is dismissed, the rule awarding them one set of costs between them will continue to apply upon the appeal. If, on the other hand, the appellant desires to appeal against the whole order and serves such contributories or creditors with notice of appeal, they will be entitled, in the event of the appeal being dismissed, to their separate costs of appeal.

In this case a petition by a shareholder for the winding-up of the above-named company was heard before Byrne J. The petition was opposed by the company and by two sets of contributories. The learned judge dismissed the petition with costs, but directed that the opposing contributories should be allowed only one set of costs between them. The petitioner appealed, and he served notice of appeal upon both sets of contributories. The appeal was dismissed with costs. The order as originally drawn up by the registrar allowed only one set of costs to the contributories opposing the appeal. Some of the contributories applied to the Court to vary the minutes by allowing them their full costs of the appeal.

Gatey, for the applicants. The appellant having served the contributories who opposed the petition with notice of the appeal, they are in the same position as any other respondents. By the order under appeal they were allowed certain costs, and if the appeal had succeeded they would have been deprived of

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those costs. The appeal having failed, they are entitled to their full costs of defending the order of the Court below, and not to one set of costs only.

R. J. Parker, for the other contributories in the same interest.

Kirby, for the petitioner. Where contributories and creditors appear to support or to oppose a winding-up petition, the contributories and creditors who are on the winning side each get one set of costs between them, and the same rule applies in the case of an appeal: *In re New Gas Co.* (1) In that case it does not appear from the report whether the opposing creditors—that was a case in which the persons opposing the petition were creditors, not contributories—were served with notice of the appeal, but presumably they must have been served. If contributories or creditors who have appeared in the Court below are not served with notice of the appeal, they will be deprived of their right of appearing on the appeal, and to give them a right to appear in the Court below and not allow them a similar right upon the appeal is to render the right to a great extent nugatory.

Gatey, in reply. *In re New Gas Co.* (1) does not touch the point, because it does not appear whether or not the creditors were served with notice of the appeal. Here the petitioner has by his own act deliberately made the contributories respondents. His proper course was, not to serve them with notice of the appeal, but to give them an intimation by letter of the pendency of the appeal, and then they could appear if they thought fit.

VAUGHAN WILLIAMS L.J. said that their Lordships would consult the registrars as to the practice before giving their judgment.

May 29. VAUGHAN WILLIAMS L.J. In this case we took time to consider our judgment, because we wanted to ascertain from the learned registrars whether in a case in which there was an appeal from a decision of the Court below upon a

(1) (1877) 5 Ch. D. 703.

winding-up petition, and that decision was upheld, there was any settled practice as to the mode of dealing with the costs of appeal of those persons, whether shareholders or creditors, who had supported the successful party in the Court below, and who had been allowed one set of costs between them in that Court according to the established practice.

We have made inquiries, and we have had a most careful report made to us by the registrars, and the result of it is that it cannot be truly said that there is any fixed practice in the matter.

Now, before stating the conclusion at which we have arrived upon this question, I propose to say a word about a case which was cited in the course of the discussion: *In re New Gas Co.* (1) It was supposed that there was something said in that case by Sir George Jessel which disposed of this question; but really if the decision is carefully looked at it does not dispose of this question at all. In that case a petition for the winding-up of the New Gas Company was heard before Bacon V.-C. The Vice-Chancellor was of opinion that the petitioner had failed to establish his case and dismissed the petition, but ordered the creditors who opposed to pay their own costs. Now that was clearly wrong, because it was plain that the creditors who opposed were entitled, according to the established practice, to one set of costs amongst them, and the Vice-Chancellor by his decision had refused them that set of costs. There was a suggestion there that there was a difference between a shareholder's petition and a creditor's petition. It was on that ground that Bacon V.-C. refused to give any costs to any of the opponents to the petition, and Sir George Jessel says (2): "I never heard of any distinction in this respect between a shareholder's petition and a creditor's petition. The advertisement which the company was bound to issue under the General Rules of 1862 says, 'Any creditor or contributory of the said company desiring to oppose the making of an order for the winding-up of the said company under the above Act, should appear at the time of

(1) 5 Ch. D. 703. (2) 5 Ch. D. 704.

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hearing, by himself or his counsel, for that purpose.' You have, therefore, invited the creditors to appear and oppose. I think they had a right to appear, and being successful they are entitled to one set of costs." That was merely a reversal of the view expressed by Bacon V.-C. in the Court of first instance, and in my opinion that is all that those words mean. There being neither express authority nor practice dealing with this matter, it rests with us here, sitting as a Court of Appeal, to lay down a rule ourselves as to how the costs should be dealt with in cases where there is an appeal from a decision from the learned judge before whom the petition for winding-up was heard; and we think that the proper rule to lay down is this—that the appellant, who presumably has been ordered to pay one set of costs amongst those shareholders or creditors who supported the respondent in the Court below, must make up his mind whether it is worth his while to disturb that part of the order which gave to those shareholders or creditors who supported the successful party one set of costs. If, having paid that one set of costs, he wishes to be recouped that amount, or if he has not actually paid those costs, but is still liable for them under the original order, and wishes to get rid of that liability, in either of those cases he is asking for an order which obviously will affect personally these individual shareholders or creditors. On the other hand, he may think that it is not worth his while to run the risk of additional costs by asking for a discharge or modification of that part of the order, and in that event he should limit his appeal accordingly; he should make it plain that by his appeal he does not seek to affect that part of the order which gave the one set of costs amongst those who supported the respondent. But then it is said, undoubtedly the shareholders and creditors who appeared below, at all events, had the right to appear on the appeal in the same way that they did in the Court below, and they must not be excluded from that right; and somehow or other they must have that notice which they would have had in the Court below under the advertisement to which Sir George Jessel refers in his judgment. Now we think that

that difficulty can be got over. The appellant, who wishes to avoid the risk of costs in respect of these costs which those supporting the respondent below either have had paid to them or have the right to have paid to them, must write a letter to those persons, or to their solicitors, informing them, if it be the fact, that he does not propose to seek to disturb that part of the order—a letter which, if properly framed, of course must announce the fact of the pending appeal; and then any creditors or shareholders who think fit to appear upon the appeal may do so, but they will do so, under the practice which we propose to lay down, with full knowledge that the rule as to one set of costs amongst them all, which is the established rule in the Court of first instance, will continue to apply in the Court of Appeal. I hope that I have made my meaning plain; but it is shortly this, that inasmuch as there is here an appeal which, if it extends to the order as a whole, might take away from those creditors or shareholders the costs which they got in the Court below, the appellant must take care to give due notice to the persons entitled to these costs that he does not propose to ask to have the order modified or discharged in such a way as to affect their right to the costs which have been allowed them by the judgment in the Court below. But, having regard to the fact that the shareholders and creditors will have the right to appear in the Court of Appeal if they like, notwithstanding that they personally are not proposed to be affected by the order that is asked for by the appellant, a letter such as that which I have suggested ought to be written to them saying that it is not proposed to affect that part of the order which deals with their costs; and then if those creditors or shareholders like to appear, they will appear with the knowledge that they will only get one set of costs amongst them.

Cozens-Hardy L.J. I agree. The result is of course in the present case that the respondents will each get their costs. The limitation of one set of costs between them will be struck out. The order on the appeal will be dated as from to-day, so that the costs of this application will be included.

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VAUGHAN WILLIAMS L.J. Romer L.J. is unable to be present to-day, but he asks me to say that he concurs in this judgment.

Solicitors: *Ingle, Holmes, Sons & Pott; Pritchard & Sons; Ashurst, Morris, Crisp & Co.*

H. B. H.

C. A. 1903 KEKEWICH J. *May* 7 C. A. *June* 9.

WEST *v.* LORD SACKVILLE.

[1902 W. 2431.]

Perpetuating Testimony—Right of Action—Order for Examination—Discretion of Court—Legitimacy Declaration Act, 1858 (21 & 22 *Vict. c.* 93), *s.* 1—*Rules of Supreme Court*, 1883, *Order* XXXVII., *r.* 35.

An action was brought to perpetuate testimony concerning the validity of the marriage of the plaintiff's mother with a view to establish his claim to succeed, on the death of his father, to a peerage and to the family estates, to which the plaintiff claimed to be entitled as next tenant in tail male in remainder expectant on the death of his father:—

Held, by the Court of Appeal, that, inasmuch as the sole question really in dispute was the validity of the marriage of the plaintiff's mother, and he could, by proceeding under the Legitimacy Declaration Act, 1858, obtain an immediate judicial determination of that question, an order for the examination of witnesses abroad, for the purpose of perpetuating their testimony, ought not to be made.

Under rule 35 of Order XXXVII. the Court has a discretion as to making such an order, and is entitled to consider all the circumstances of the case.

Decision of Kekewich J. reversed.

Per Stirling L.J.: *Semble*, that the plaintiff could at once, by virtue of the Rules of the Supreme Court, 1883, Order XXV., r. 5, bring an action for a declaration of his title to the estates as tenant in tail in remainder expectant on the death of his father.

THIS action was brought by Ernest Henri Jean Baptiste Sackville West, against Lord Sackville and several other members of the Sackville West family and the Attorney-General, for the purpose (as alleged in the statement of claim) of perpetuating testimony with regard to the following facts: That the plaintiff was the lawful and eldest son of the defendant Lord Sackville, and was entitled under a settlement dated August 2, 1871, to an estate in tail male expectant on the

decease of that defendant in the family estates, and to the dignity, title, and honour of Baron Sackville of Knole. The Attorney-General was made a defendant to the action by reason of the claim to the peerage. The remaining defendants other than Lord Sackville claimed the estates by virtue of a disentailing deed and settlement made in June, 1890, on the footing that there was not then in existence any issue of Lord Sackville.

The plaintiff by his statement of claim alleged that Lord Sackville was married to one Joséphine Duran de Ortéga in 1864 or 1865, either in Spain or in France, and that the plaintiff was the eldest child of the marriage, having been born at Arcachon in France on June 24, 1869; and, further, that the defendants (other than the Attorney-General) falsely alleged (1.) that this marriage did not in fact take place and that Lord Sackville was never married; and (2.) that the lady in question was on January 10, 1851, lawfully married to one Juan Antonio Gabriel de Oliva, and that that marriage was subsisting at the time of her alleged marriage with Lord Sackville. The plaintiff further alleged that he had discovered and was able to procure evidence that the lady was acknowledged by Lord Sackville to be his lawful wife, and that the plaintiff was acknowledged by Lord Sackville and his wife to be the lawful issue of the marriage, but that the plaintiff was unable to bring to trial his rights and claims during the lifetime of Lord Sackville; that several of the necessary witnesses with respect to the facts to be proved in support of the plaintiff's claims were old and infirm, and others resident in France and Spain; and that their evidence would be lost to the plaintiff before he could bring his rights and claims to trial unless their testimony was taken forthwith and was preserved.

The defendants (other than the Attorney-General) by their defence disputed the plaintiff's right of action upon the ground that, upon the facts set forth in the statement of claim, he was entitled to take proceedings at once under the Legitimacy Declaration Act, 1858, for the determination of the question of his legitimacy.

The plaintiff took out two summonses in the action—one

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for the issue of letters of request directed to the proper tribunal in Spain for the examination of certain witnesses therein enumerated; the other for leave to sue out a commission for the examination of certain witnesses resident in France. These applications were supported by an affidavit of the plaintiff's solicitor, which in effect verified the allegations in the statement of claim, and stated that the evidence proposed to be taken would tend materially and effectually to establish the fact that Joséphine Duran de Ortéga was in fact the lawful wife of Lord Sackville, and was acknowledged as such by him.

It appeared that in 1897 the defendants (other than the Attorney-General) had brought an action against the present plaintiff and the Attorney-General to perpetuate testimony concerning the fact that the present plaintiff was not the lawful son of Lord Sackville; that in that action several Spanish witnesses were examined in Gibraltar with reference to the alleged marriage of 1851, and were cross-examined on behalf of the Attorney-General; that the present plaintiff was represented by a Mr. Hooker, who was invited to cross-examine the witnesses but declined to do so, and that he had been paid his costs of attending those proceedings. It was proposed to examine some of these witnesses in the present action, and it was alleged by the defendants (but denied by the plaintiff) that efforts had been made to induce them to contradict the evidence which they had already given at Gibraltar.

It further appeared that an erasure had been made in the registry of the marriage of 1851, and it was alleged on behalf of the defendants that the entry of that marriage had been recently tampered with, and on behalf of the plaintiff that it was a forgery.

With reference to the refusal of Mr. Hooker to cross-examine, the explanation given on behalf of the plaintiff was to the effect that he was then without pecuniary means to instruct lawyers on his behalf, and that Mr. Hooker, who was a clerk in a French firm, merely watched the proceedings on behalf of the plaintiff, and was not in a position, and moreover was not competent, to cross-examine the witnesses.

The summonses were heard before Kekewich J. on May 7, 1903.

Warrington, K.C., *Waggett*, and *J. P. Valetta*, for the plaintiff. The defendants resist this application on the ground that an action might have been brought under the Legitimacy Declaration Act, 1858, and they say that that is a bar to this action. In order to come under that Act the plaintiff must either be claiming estates in England or must be domiciled in England or Ireland. The only claim mentioned in s. 1 of that Act is a claim to estates, and the Act does not apply to a claim to a dignity or honour; and if the plaintiff asks for a declaration in gross he must be domiciled in England or Ireland; but that is not shewn here. Further, the Act does not meet the case of a future claim to estates where interested parties might come into existence who could not be cited and would not be bound (see s. 8). It is, therefore, essential that the plaintiff should be at liberty to perpetuate the testimony on which he must rely when he comes to assert his rights. The affidavits shew that there are very serious questions of fact at issue. The plaintiff comes within the terms of rule 35 (1) of Order XXXVII., for he cannot bring his claim to the estates or to the peerage to trial until the death of Lord Sackville. This action is, therefore, well founded, and an order ought to be made on both summonses.

[They cited *Allan* v. *Allan*. (2)]

Eldon Bankes, K.C., and *R. V. Bankes*, for the defendants other than the Attorney-General. (1.) This action is not maintainable. The test is whether there is any proceeding by which the matter in question can be made the subject of an immediate judicial investigation: *Angell* v. *Angell*. (3) The

(1) Rule 35 of Order XXXVII. of the Rules of the Supreme Court provides that "any person who would under the circumstances alleged by him to exist become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim."

(2) (1808) 15 Ves. 130.

(3) (1822) 1 S. & S. 83; 24 R. R. 149.

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Legitimacy Declaration Act exactly covers this case. The plaintiff claims in respect of the dignity and in respect of the estates. Both branches of the plaintiff's claim depend upon his establishing the same fact, namely, that Lord Sackville was lawfully married to the plaintiff's mother, and present proceedings can be taken by the plaintiff under that Act to have that question judicially determined. It is objected that before the death of Lord Sackville persons may come into existence who cannot be cited and would not be bound. But the answer to that objection is that the evidence proposed to be given in the present action would only be binding upon the parties, and the plaintiff is in precisely the same position whichever mode of procedure he adopted. Further, by s. 6, the Attorney-General would be bound by proceedings under that Act.

(2.) In any event, no order should be made for the further examination of witnesses who have been examined already. In the former action the Spanish witnesses were cross-examined on behalf of the Attorney-General, and the plaintiff was himself represented, and his representative was invited to cross-examine, but he deliberately abstained from doing so, and he has since been paid the costs of that attendance. In these circumstances the plaintiff is estopped from applying for any further examination of those witnesses: *Watkins* v. *Atchison* (1); *Campbell* v. *Earl of Dalhousie*. (2) Moreover, the Court in its discretion will refuse to allow the further examination under a foreign procedure of witnesses who are asked to resile from their previous evidence: *In re Boyse*. (3)

(3.) No order should be made until the judge has seen the questions which are to be submitted to the witnesses. On issuing a letter of request the practice is to formulate the questions to be put to the witnesses, and these questions are then transmitted to the Foreign Office with the letter of request, and through that office to the foreign State: Practice Masters' Rules, r. 13A.

(4.) If any order is made, directions should be inserted in the letter of request to permit of a cross-examination.

(1) (1853) 10 Hare, App. xlvi. (2) (1869) L. R. 1 H. L., Sc. 462.
(3) (1882) 20 Ch. D. 760.

Sir R. B. Finlay, A.-G., and *R. J. Parker*, for the Attorney-General. Proceedings of this kind ought to be jealously watched, and, if the Legitimacy Declaration Act, 1858, applies, this application should not be granted: Mitford on Pleading, 5th ed. p. 62; Taylor on Evidence, 9th ed. p. 352, n., citing *Campbell* v. *Earl of Dalhousie*. (1)

[KEKEWICH J. Do the words "claiming any real or personal estate" go beyond an estate in possession?]

The words are quite general, and extend to a claim in futuro. Having regard to the importance of the questions raised and the character of the evidence, it is very desirable that there should be a vivâ voce examination of some of the witnesses.

Warrington, K.C., in reply. Rule 35 of Order XXXVII. contemplates an immediate determination of the claim, and that agrees with *Angell* v. *Angell*. (2) The plaintiff cannot bring to trial now the claim to the dignity or to the property. He can only bring to trial the question whether or not a certain fact exists which will be material to his claim hereafter. A decision under the Legitimacy Declaration Act is not an immediate judicial investigation of the claim within the contemplation of that rule.

KEKEWICH J., after referring to rule 35, continued:—I do not rely upon any difference between the right to the honour or peerage and the right to the estates. It is quite true that the plaintiff cannot now claim any right to the peerage, because the constitution of the realm does not allow of any claim to a peerage being made except by a person entitled in possession. Therefore, it is quite possible that the plaintiff may be desirous to perpetuate testimony as regards his title to the peerage independently of the testimony as regards the estates. But the issue is the same in both cases. Therefore, I may put aside any question about the peerage, and decide the question which I have to decide with reference to the estates only. If the plaintiff is right as regards the claim to the estates, he is equally right as regards the claim to the peerage. Rule 35 says that he may maintain a suit to perpetuate

(1) L. R. 1 H. L., Sc. 462. (2) 1 S. & S. 83; 24 R. R. 149.

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testimony when the right or claim to the estates cannot be brought to trial before the happening of a future event. He is tenant in remainder according to his own case, and he cannot claim the estates immediately. He can, no doubt, take proceedings under the Legitimacy Declaration Act, because he comes within the exact words of s. 1, being a person claiming real estate in England, and, if he takes proceedings under that Act, he may have it determined whether his mother was lawfully married to Lord Sackville, and that will be conclusive as regards his claim to the estates as well as to the peerage. But in form it is not the same thing, looked at as a matter of law. His claim to the estates is that he is entitled as tenant in remainder expectant on the death of Lord Sackville. There is no means of trying that issue now. It is impossible for any one to say that his right or claim to the estates can be brought to trial before the happening of the event which will bring his title into possession. I think that the rule points to a present claim to estates in possession. That seems to me to bring all the authorities into harmony.

I have before me Lord Hatherley's language in *Campbell* v. *Earl of Dalhousie* (1): "It was not intended to give a litigant who wished to perpetuate testimony, as against a person with whom he contemplated a future litigation, rights of any stronger character than those which would be possessed by him in case the defendant were an actual defendant without any obstacle to the immediate prosecution of the suit to its ultimate result. It was not intended in any way to enlarge the rights which he might in that case possess."

Agreeable to that are the passages cited in the other cases. I need only turn to the remarks of Leach V.-C. in *Angell* v. *Angell*. (2) Referring to suits to perpetuate testimony, he said: "If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit is entertained. But if the party who files the bill can, by no means, bring the matter in question into present judicial investigation (which may happen when his title is in remainder, or when he is himself in

(1) L. R. 1 H. L., Sc. 462, 464. (2) 1 S. & S. 83, 89; 24 R. R. 149.

possession) there, Courts of Equity will entertain such a suit." That was cited by Stirling J. in *Brooking* v. *Maudslay, Son & Field.* (1) The question, therefore, to be considered is, whether the plaintiff can bring his claim to the estates into present judicial investigation. The question whether he is legitimate he can raise under the Legitimacy Declaration Act, but he cannot raise the question of his claim to the estates because he is tenant in remainder, and, therefore, the Court will entertain his suit to perpetuate testimony. That is entirely in accord with the view of Leach V.-C. For these reasons I think that the objection under the Act fails, and that the plaintiff has made out his case. The matter must be sent to chambers to settle the forms in such a way as to do justice.

[Leave to appeal was granted.]

H. B. H.

The defendants (other than the Attorney-General) appealed. The appeal was heard on June 9, 1903.

Eldon Bankes, K.C., and *R. V. Bankes*, for the defendants; and *Warrington, K.C.*, and *Waggett*, for the plaintiff, respectively repeated the arguments which they had adduced in the Court below, and referred to the same authorities.

Frederick v. *Attorney-General* (2) was also cited. In that case it was held that the Court had no jurisdiction under the Legitimacy Declaration Act to investigate or decide upon a claim to a title of honour.

In answer to the Court,

Sir R. B. Finlay, A.-G. (with whom was *R. J. Parker*), said that on behalf of the Crown he took a neutral position. But he was prepared to submit that it was within the discretion of the Court whether an action for perpetuating testimony should be allowed. *Frederick* v. *Attorney-General* (2) is not relevant to the present case. If the making of the order is within the discretion of the Court, it is an important consideration in the exercise of that discretion that it is desirable in the interests of

(1) (1888) 38 Ch. D. 636, 644. (2) (1874) L. R. 3 P. & M. 196.

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justice that the question should be brought to trial during the lifetime of Lord Sackville, who must know the facts about the alleged marriage. If proceedings were taken under the Legitimacy Declaration Act the issue of a commission or letters of request for the examination of witnesses abroad would not be a matter of absolute right: Order XXXVII., rr. 5, 6A. The Court might give leave as to the examination of some witnesses, but might say that it was material that the judge should see those witnesses who were to give evidence as to the alleged forgery.

[STIRLING L.J. Under rule 5 of Order XXV., could not the plaintiff bring an action now for a declaration of his title in remainder to the estates?

VAUGHAN WILLIAMS L.J. Will the plaintiff undertake to bring an immediate action for a declaration of his title to the estates?]

Warrington, K.C. I am not prepared to give such an undertaking.

Eldon Bankes, K.C., in reply.

VAUGHAN WILLIAMS L.J. In my opinion the order which was made by Kekewich J. for the examination of witnesses ought not to have been made. I do not agree with the suggestion (if it was really intended to be made) that any one is entitled as a matter of right to an order of this kind in an action to perpetuate testimony. Even if the circumstances are such that an action to perpetuate testimony will clearly lie, I think there must always be a discretion in the Court whether it will make the order or not. Now I quite agree with the view of Kekewich J. that this plaintiff's case has not been brought before the Court in such a way as to recommend it, or to induce the Court to exercise its discretion in his favour in a case in which it might be doubtful whether the order should be made. But I do not think we can decide the case upon that ground. It was suggested by Mr. Bankes that, because under the old practice a suit for the perpetuation of testimony could only be effectively brought in a case in which the matter in controversy could not be made the subject of

immediate judicial investigation by the person who sought to perpetuate testimony, it necessarily followed that, inasmuch as this plaintiff could, if he chose, at once bring an action under the Legitimacy Declaration Act, an order for examination of witnesses ought not to be made. I cannot agree to that. I agree that in the exercise of discretion the fact that such an action can be brought is a very proper matter to take into consideration. But I hesitate to lay down an absolute rule that in no case in which an action could be brought immediately, and the matter in controversy be thus at once determined, could an action be brought for the perpetuation of testimony or an order made such as has been made here. For instance, in the present case the defendants have themselves actually commenced an action to perpetuate testimony, and they have had an examination of witnesses at Gibraltar before the Court there in the presence of the acting Attorney-General there appearing on behalf of the Crown. It is obvious, on the facts which are common to both sides, that since that examination took place a matter has come to be public knowledge which was unknown to both sides at the time of the examination—I mean the erasure in the ecclesiastical register—a matter which obviously might be of very great importance as regards the value of the evidence taken in Gibraltar. I should hesitate to say that there is any hard and fast rule which would prevent an order being now made either for the further examination or cross-examination of the witnesses examined under the order obtained by the defendants, or even for the examination of other witnesses who might throw light on the question at what time this erasure, which all parties agree does appear in the register, was detected.

It will be convenient to see how the matter stands under the rules, and to refer shortly to the old practice. [His Lordship read rule 35 of Order XXXVII., and continued:—]

We have had a discussion as to the effect of these words, "the right or claim to which cannot by him be brought to trial before the happening of such event." It is said that what the plaintiff is really claiming is either the title to the peerage or the estate or interest in tail in the property in remainder

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expectant upon the death of Lord Sackville, and it is said that no action can now be brought to establish either the title to the peerage or the right or claim to the property. I am not sure that it is necessary to decide exactly what those words mean; but, whatever may be their strict meaning, it seems to me that the Court, in the exercise of its discretion, ought to refuse to make an order for examination of witnesses if it is of opinion that the only matter really in controversy—namely, the legitimacy of the plaintiff—can be immediately disposed of by his bringing an action under the Legitimacy Declaration Act.

I will refer to those sections in Story's Equity Jurisprudence which deal with the matter. First, in s. 1505, the learned author says: "Let us now pass to the consideration of bills to preserve and perpetuate testimony. The object of all bills of this sort is to preserve and perpetuate testimony when it is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation." Then, in s. 1508, he says: "If therefore it be possible that the matter in controversy can be made the subject of immediate judicial investigation by the party who seeks to perpetuate testimony, Courts of Equity will not entertain any bill for the purpose. For the party under such circumstances has it fully in his power to terminate the controversy by commencing the proper action; and therefore there is no reasonable ground to give the advantage of deferring his proceedings to a future time, and to substitute thereby written depositions for vivâ voce evidence." It seems to me that that rule of practice, which was established of old in Courts of Equity, ought to govern the discretion of the judge under Order XXXVII., r. 35—that is, no assistance ought to be given to a plaintiff who can, if he chooses, bring the matter in controversy to an immediate judicial investigation. Primâ facie, therefore, it seems to me that an order for the examination of witnesses ought not to be made in such a case.

But, as I have already said, these two facts, namely, the fact that the defendants have themselves already taken proceedings to perpetuate testimony and have examined their

witnesses, and the fact that matters have occurred since that examination which clearly must throw a great deal of light on the question in controversy, might, in my opinion, afford a good reason for departing from the rule which would ordinarily regulate the discretion of the judge in such a matter. In the present case, therefore, I was very anxious to prevent, if I could, any injustice being done to the plaintiff by placing him in such a position that the evidence already taken on behalf of the defendants could not be supplemented by a further explanation by the witnesses who have been examined, and, if necessary, by the testimony of other witnesses, of those facts which are common ground between the parties and which might throw much useful light upon the matter in issue, and I tried to see whether we could not do something to assist the plaintiff in this respect. But the plaintiff, as he is perfectly entitled to do, declines to undertake, either immediately or within a limited time, to bring any action to establish his claim. The inference I draw is that he does not feel much pressed by the disadvantage which I thought might result to his case if a further examination of these witnesses were not allowed to take place, and that at all events, if he does feel at all pressed by that disadvantage, he is more pressed by the advantage which will accrue to him by postponing the trial of his action till after the death of Lord Sackville, when the only way in which his evidence will be available will be by reading his deposition, which is almost certain not to deal effectually with all the points of active attack which it may then be open to the plaintiff to make, and which may not even in the cross-examination of Lord Sackville on the plaintiff's behalf have been so definite as to indicate to the other side what was going to be done. Under the circumstances I think it is desirable to deal with this case as one in which the plaintiff might, if he chose, have the question of his legitimacy determined at once—a question which goes to the root of his claim, whether to the peerage or to the estates. And so treating the case, I do not think that any order ought to be made to assist the plaintiff in postponing the determination of the question. I have no reason to doubt that the defendants

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have been well advised as to the proper course for them to take, and I will not attempt to criticize their conduct. But, speaking generally, I believe that it is the interest of a party who believes his cause to be just and right to get all possible light thrown upon it, and to leave nothing obscure or in doubt. I can quite conceive the defendants taking the view that, having regard to what happened when the evidence was taken in Spain, if that evidence should ever be used after the death of the witnesses its value would have been enhanced tenfold if it had been supplemented by the examination of the same witnesses or of other witnesses as to the material facts which have since come to light, and which were not suggested to the witnesses when they were examined. In the circumstances the defendants must choose for themselves what line they think will be most likely to secure justice or to throw light upon the material facts of the case. But I do not believe that light is often thrown upon a case by the exclusion of any kind of evidence.

ROMER L.J. In my opinion the Court was not bound under the circumstances of this case to make an order at the plaintiff's instance for the examination of the witnesses referred to in the affidavit filed on his behalf. I cannot say that the action was one that, on the face of it, could not be brought under Order XXXVII., r. 35; but it must be borne in mind that that rule and the subsequent rules 36, 37, and 38 are rules of procedure, and are not intended to form a code of law. In my opinion rule 35 does not compel the Court to make an order in favour of the plaintiff in every action which may fall within the terms of the rule. I think, therefore, that we are entitled to look at the circumstances of the case to see whether an order ought to be made in favour of the present plaintiff. It is to be observed that the only testimony which he seeks to perpetuate is for the purpose of proving that there was a valid marriage between his mother and Lord Sackville. I include in that question two distinct issues—the one whether there was in form a valid ceremony of marriage between his mother and Lord Sackville, and the other whether, even if

there was what otherwise would have been a valid marriage between them, the lady was or was not at the time a married woman, so as to render the ceremony, even if otherwise valid, invalid as between her and Lord Sackville. The validity of that marriage is the sole question of fact as to which the plaintiff requires testimony, and it is the sole question in dispute between the parties to this action. I take it to be clear, as is pointed out in the passages which have been cited from Story's Equity Jurisprudence and Mitford on Pleading, 5th ed. pp. 62, 173, that the Court will not in actions of this kind accede to the demand of the plaintiff to perpetuate testimony when he can bring the fact which he wishes to establish by evidence to the immediate determination of a competent tribunal. There are very good reasons why the Court should not accede to the plaintiff's demand in such circumstances. Those reasons have so often been stated that I need not repeat them, and I will only say that they apply in their fullest force to the present case, as is shewn by the nature of the evidence which is brought before us on this application. It is perfectly clear that the only question of fact as to which the plaintiff requires evidence, and the only question in dispute between the parties, can, on an application by the plaintiff under the Legitimacy Declaration Act, 1858, be effectually and properly determined at once by the Divorce Court, and under the circumstances I think the Court ought not to accede to the plaintiff's demand, but should leave him to proceed under that Act. On this short ground I think the appeal ought to be allowed.

STIRLING L.J. I am of the same opinion. The action is brought to perpetuate testimony with reference to the following facts as set forth in the statement of claim, namely, that the plaintiff is the only lawful son of Lord Sackville, and as such entitled to an estate in tail male in remainder in certain lands and properties referred to, and to an estate in the dignity or title or honour of Baron Sackville of Knole created and granted by letters patent. Now actions or suits, as they were formerly called, for the perpetuation of testimony arose in Courts of

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Equity, and their object, as stated by Sir John Leach in *Angell* v. *Angell* (1), was to prevent a failure of justice. The learned judge there said (2) that "Courts of Equity do not entertain bills to perpetuate testimony generally for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of justice"; and he went on to say that, "if it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit is entertained." Bills to perpetuate testimony, therefore, would only be entertained by the Court of Chancery when it was absolutely necessary to prevent a failure of justice. The procedure with reference to this class of actions is now governed by Order XXXVII., r. 35, and, in my opinion, although a plaintiff may bring himself within the terms of that rule, yet in considering whether any relief should be given to him we are entitled to look at the foundation of the old jurisdiction and the mode in which in former days it was exercised. These are matters to which, as it seems to me, attention must be given in a case of this kind. Here, the main fact—that upon which everything else turns—as to which the plaintiff seeks to perpetuate testimony is his own legitimacy. By the Legitimacy Declaration Act of 1858 a means has been provided by which all the facts as to which it is sought to perpetuate testimony can be at once investigated by a properly constituted tribunal. According to the law as laid down by Lord Redesdale in his treatise on Pleading, 5th ed. p. 62, "the bill ought to shew that the facts to which the testimony of the witnesses proposed to be examined is conceived to relate cannot be immediately investigated in a Court of law." Here the facts to which the testimony of the witnesses who are proposed to be examined on behalf of the plaintiff is conceived to relate can under the Legitimacy Declaration Act be immediately investigated by the proper Court.

I wish to point out another matter which ought, I think, to be taken into consideration. A great change was introduced into the law with reference to declaratory actions by the Rules of the Supreme Court of 1883, Order XXV., r. 5. In *Ellis* v.

(1) 1 S. & S. 83; 24 R. R. 149. (2) 1 S. & S. 89.

Duke of Bedford (1) Lindley M.R. said: "Moreover now, under the Judicature Act, actions can be brought merely to declare rights, and this is an innovation of a very important kind. I am referring to Order XXV., r. 5, which says, 'No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not.'" Without finally deciding the point, if in the present case the defendants were willing (and I infer from what their counsel said that they are) to have the whole case tried in an action simply seeking a declaration of the plaintiff's title to the family estates, this would very much influence my judgment in considering whether the relief which is sought by the present action ought to be given.

On the ground that a means has been provided by the Legislature of which the plaintiff can avail himself for the investigation of the facts of which he seeks to perpetuate testimony, I think that the order of Kekewich J. ought not to have been made, and that the appeal ought to be allowed.

Solicitors: *Meynell & Pemberton; Osborn & Osborn; Solicitor to the Treasury.*

(1) [1899] 1 Ch. 494, 514.

W. L. C.

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BYRNE J.
May 1, 6.
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June 10.

In re MACINTOSH AND THOMAS, SOLICITORS.

Costs—Taxation—Common Order—Extension of Time—Jurisdiction of Taxing Master—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 57.

The common form of order for taxation of a bill of costs, when the order is made upon the application of the client after the expiration of one month but before the expiration of twelve months from the delivery of the bill, provides that the taxing master "is to make his certificate in a month (unless the said master shall extend the time to enable him to make his certificate), or this order is to be of no effect."

By Order LXV., r. 27, sub-r. 57, where a time is appointed for any proceeding before the taxing master, unless the Court or judge shall otherwise direct, the taxing master is empowered to extend the time, even though the application for extension is made after the appointed time:—

Held, upon the construction of the order for taxation read in conjunction with sub-rule 57, that the taxing master had power to grant an extension of the time after the expiration of the month appointed by the order for the making of his certificate.

Decision of Byrne J. reversed.

Per the Court of Appeal: The power of the taxing master to extend the time under an order in this form ought not to be exercised as of course or freely.

MOTION.

This was an application by solicitors to stay all further proceedings under an order for taxation of certain bills of costs.

On January 16, 1902, the applicants delivered to their clients, the Treharris Brewery Company, Limited, of Cardiff, five bills of their fees and disbursements. On December 1, 1902, the company obtained an order of course for the taxation of these five bills, in the form required after the expiration of a month from delivery, which concluded as follows: "That no proceedings be commenced against the petitioners in respect of the said bills pending this reference, but the said master is to make his certificate in a month (unless the said master shall extend the time to enable him to make his certificate), or this order is to be of no effect." This order was not served on the solicitors till January 7, 1903.

On January 9 the taxing master gave notice of an appointment to proceed with the taxation of the said five bills for

January 27, although no application had then been made by the Treharris Brewery Company, Limited, for any extension of time to enable the master to make his certificate. At the appointment for January 27, counsel on behalf of the solicitors attended and objected to the jurisdiction of the master to proceed with the taxation on the ground that the order of course had become abortive by effluxion of time. The master thereupon adjourned the appointment to consider this objection, and eventually decided that he had jurisdiction to extend the time for making his certificate, and he accordingly extended it to March 1; and, subsequently, on an order to wind up the Treharris Brewery Company, Limited, having been made, he extended it again to May 27.

On January 6 a petition to wind up the Treharris Brewery Company, Limited, was presented, upon which a winding-up order was made on February 5, and the solicitors alleged that service of the order of course had been wilfully delayed for an ulterior purpose. The Court, however, did not go into any question of motives, or of the merits of the case; the question being argued as one of law upon the facts as above stated. The solicitors now moved for an order that all further proceedings under the said order for taxation of December 1, 1902, might be stayed, "the time thereby limited for the taxing master to make his certificate having expired."

The motion was heard before Byrne J. on May 1, 1903.

A. Adams, for the applicants. The clients deliberately allowed the time limited by the order to expire before even serving it upon the solicitors: the jurisdiction of the taxing master, therefore, to extend the time for his certificate had gone. This seems clear from the observations of North J. in *In re Webster* (1) and *In re Taylor, Sons & Tarbuck*. (2) Order LXV., r. 27, sub-r. 57, was relied on by the taxing master as giving him power to extend; but, when he made the order extending the time, there was no living "proceeding" before him, as the month limited by the order had run out: unless the time is extended within this month, the order ceases. Order LXV., r. 27, sub-r. 57, is very

(1) [1891] 2 Ch. 102. (2) [1894] 1 Ch. 503.

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similar in its wording to Order LXIV., r. 7; the analogy of the decisions interpreting that rule is, therefore, applicable to this case. In *Whistler* v. *Hancock* (1), *Wallis* v. *Hepburn* (2), and *King* v. *Davenport* (3), it was held that where an order has been made dismissing an action unless some act is done within a specified time, the time for doing the act cannot be enlarged after it has expired, because the action is dead. In the present case the order is to be "of no effect" unless the certificate is made within one month, or the time is extended before the order expires. If it is a question of discretion, the clients by their own delay have lost any right to an extension of time; they are getting a great deal more time than the Solicitors Act intended to give them. Solicitors are not to be stopped indefinitely from suing for their costs. Assuming a mistake has been made as to the meaning of Order LXV., r. 27, sub-r. 57, the mere fact that application to extend the time was not made in time, is not a sufficient ground for enlarging the time now: *International Financial Society* v. *City of Moscow Gas Co.* (4) The solicitors are, therefore, entitled to a stay of all further proceedings under this order to tax.

R. Rowlands, for the respondents. This motion is in effect an appeal from an order made by the taxing master in the exercise of his discretion; the words of Order LXV., r. 27, sub-r. 57, are express, "although the application for the same is not made until after the expiration of the time appointed." The Court does not interfere with the discretion of the taxing master. In *In re Taylor, Sons & Tarbuck* (5) this order was not cited or referred to. *In re Webster* (6) was quite a different case, and does not apply. The analogy of the cases of *Whistler* v. *Hancock* (1) and *King* v. *Davenport* (3) does not apply; the power to extend the time in those cases was on quite a different footing; when the application was made the actions were dead, and there was no action before the Court with which it could deal. In the present case the right to get taxation of these bills was still a subsisting right; even if the order had expired,

(1) (1878) 3 Q. B. D. 83.
(2) (1878) 3 Q. B. D. 84, n.
(3) (1879) 4 Q. B. D. 402.
(4) (1877) 7 Ch. D. 241.
(5) [1894] 1 Ch. 503.
(6) [1891] 2 Ch. 102.

the right of the clients to obtain taxation, possibly by means of another order, still existed; there was therefore a living proceeding at the time the order to extend was made; the proceeding or matter, i.e., the question of taxation, had not ceased to exist; it was still under the jurisdiction of the Court, and the taxing masters, therefore, had power to enlarge the time.

Adams, in reply.

BYRNE J. said he would make inquiries of the taxing masters whether there was any special or established practice in the office on this point, before delivering judgment.

May 6. BYRNE J., after stating the facts, continued:—There is no question in this case of waiver or consent; the objection to the jurisdiction of the taxing master to extend the time was taken at the earliest opportunity and has been insisted upon ever since. Primâ facie, there having been no extension of time, after the month limited by the order has expired the order has gone; but by Order LXV., r. 27, sub-r. 57, it is provided that: "The taxing officer shall have power to limit or extend the time for any proceeding before him, and where, by any general order, or any order of the Court or a judge, a time is appointed for any proceeding before or by a taxing officer, unless the Court or judge shall otherwise direct, such officer shall have power from time to time to extend the time appointed upon such terms (if any) as the justice of the case may require, and although the application for the same is not made until after the expiration of the time appointed, it shall not be necessary to make a certificate or order for this purpose, unless required for any special purpose." It is a little doubtful how the last words of the rule are to be read, but I think I am right in reading them as a separate sentence: "It shall not be necessary to make a certificate or order for this purpose, unless required for any special purpose." Under those circumstances it is said that the taxing master had power, although the application for extension of time was not made until after the lapse of the month, to extend the time and proceed with the taxation.

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The question is one of considerable importance, and does not seem to have been the subject of express decision. There are two cases I will refer to in which there are dicta relating to this matter: the first is *In re Webster* (1), which was a case before North J., in which an order was made in these words: "And it is ordered that no proceedings be commenced against the petitioner in respect of the said bill pending this reference, but the said master is to make his certificate in a month (unless the said master shall extend the time to enable him to make his certificate)"—exactly in the same form as in the present case—"or this order is to be of no effect." In that case a second order had been obtained without mention of the first order, and upon that ground the learned judge decided the case, and held that there was an irregular order; but in the course of his judgment he says (2): "The first point taken on behalf of the solicitor is, that the client, by obtaining the order of the 1st October, exhausted his statutory remedy by order of course, and that he could not, after that order had become ineffectual, obtain a second order of course to tax the same bill. It is also said that there was a suppression of material facts when the second order was obtained. I think this argument is well founded. I think that, when a client has obtained the common order to tax his solicitor's bill—an order which prevents the solicitor from commencing proceedings against the client in respect of the bill pending the reference, and also provides that, unless the master makes his certificate within a month, the order is to be of no effect—the client ought not to apply for a second precisely similar order of course, suppressing the fact that he has obtained the first order, and that he has allowed it to become ineffectual." The exact question now before me was not involved in that decision; but the learned judge obviously takes the view that at the expiration of the month, no application having been made, the order had become ineffectual.

The second case referred to is *In re Taylor, Sons & Tarbuck.* (3) There an order had been made: ". . . . but the master is to make his certificate in a month (unless the said

(1) [1891] 2 Ch. 102. (2) [1891] 2 Ch. 107. (3) [1894] 1 Ch. 503, 505.

master shall extend the time to enable him to make his certificate), or this order is to be of no effect." In that case the master had decided that the order had become inoperative because he had not extended the time for making the certificate as required by the order. In the course of the argument, counsel for the clients says: "The client could not fix the day for taxation; the day was fixed by the taxing master himself. [North J. The month had expired then; what jurisdiction had the taxing master to fix a day then?]" Counsel does not answer this question, but at the bottom of p. 506 the learned judge answers it himself: "By means of the first order of course they suspended for a month the solicitors' remedy for the recovery of their costs, and then, when that order had become abortive by effluxion of time, they obtained ex parte the second order of course to tax the bill. In my opinion, in so doing they were entirely wrong. I do not mean to say that the right of taxation had been lost; but it ought not to have been exercised by means of an order of course. An order to tax the bill could have been obtained on a special application." There the learned judge speaks of the order having become abortive by effluxion of time.

There are no decisions on the precise point; but there is a certain analogy between the present case and cases arising under Order LXIV., r. 7, which provides: "A Court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed"—words sufficiently wide.

The matter was considered in the case of *Whistler* v. *Hancock* (1), where an order had been made dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week. The week having expired, and no statement of claim having been delivered, it was held that the action was at an end, and there was no jurisdiction to make an

(1) 3 Q. B. D. 83, 84.

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order subsequently extending the time for delivery of the statement of claim. The learned judge said: "It cannot be contended that the taking out of a summons to set aside the appearance in the meantime could keep the action alive after the period when by the operation of the master's order it was defunct."

In *King* v. *Davenport* (1) an order having been made on the 6th of May dismissing the action for want of prosecution, if the statement of claim were not delivered within fourteen days, on the 19th May the plaintiff took out a summons returnable the next day, the last of the fourteen days, for further time to deliver statement of claim. The summons was, on the 20th, adjourned, by the consent of the parties in writing indorsed thereon, till the 21st, and on the 21st a master made an order giving seven days more for delivery of statement of claim. Pollock B., having rescinded the order of the master on the ground that he had no jurisdiction, the action being at an end on the 20th May, it was held that his view was right, that the action was at an end on the 20th May, and therefore the master had no jurisdiction to make the order giving further time. The rule I am now dealing with dates since 1883. I have made inquiries, and asked the taxing master as to any practice in chambers, or knowledge of any decision affecting this question, and Master Baker has been good enough to make inquiries in the Taxing Office, and he finds that the late Master Ryland and the late Master Longbourne declined to receive orders for taxation not brought in until after the month had expired. He says taxations have been frequently proceeded with and the time extended after the expiration of the month by other masters, but he is not aware that it has ever been done in any case where the objection to an extension of time has been pressed. He has also inquired of another master, whose experience is the same. So that there is no practice and no authority justifying the enlargement of time by the taxing master, and I have to decide on what I consider to be the true meaning of the rule.

(1) 4 Q. B. D. 402, 403.

I think that the force of the words, "or this order is to be of no effect," destroys the proceeding altogether: that there is no longer a proceeding under which the taxation can take place, and that the power to enlarge the time is meant to be power to enlarge the time while there is a pending matter. But for the final words, "or this order is to be of no effect," I think the order would be a subsisting order and the time could be extended. But that direction does not occur in every order to tax, though it does appear to be the usual form of order for taxation after the expiration of one month from delivery and before the expiration of the twelve months. I think the result is that the taxing master had no power to enlarge the time, nothing having been done and the order not having been served until after the expiration of the month. I must, therefore, direct no further proceedings to be taken on the order in question.

I may point out that the question of extending the time would often be of comparatively small importance, and I can quite understand parties waiving the objection in many cases, because if this order had been obtained at an earlier date it would have been only a question of coming again to the Court, and, on a proper case being made out, a second order in similar form would have been made for taxation. The importance of the matter in the present case arises from the fact that the clients put off obtaining the order so long that, if it is of no effect, they will only have such rights as a client has where the application to tax is made after the expiration of twelve months since the delivery of the bills.

The motion must be allowed with costs.

W. C. D.

C. A.

The clients appealed from this order. The appeal was heard on June 10, 1903.

R. Rowlands, for the clients. Order LXV., r. 27, sub-r. 57, meets this case. Under that sub-rule the taxing master has power to extend the time although the time appointed for making his certificate has expired. Byrne J. relied upon the

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dicta of North J. in *In re Webster* (1) and *In re Taylor, Sons & Tarbuck* (2); but those cases do not affect this case, for there was not there any application to extend the time, and this sub-rule was not alluded to; and in the latter case he treated the order as living after the time had expired. *Whistler* v. *Hancock* (3) and the cases which followed that decision do not apply. Those cases were decided under Order LXIV., r. 7. They were cases in which the action was to be dismissed unless the plaintiff delivered a statement of claim within a specified time, and it was held that after that time the action was gone and the time could not be extended. In the similar case of *Collinson* v. *Jeffery* (4) Kekewich J. held that notwithstanding the lapse of the specified time the action was not dead, but was comatose or moribund only, and he extended the time.

A. Adams, for the solicitors. The Solicitors Act, 1843, s. 37, empowers the Court, where an order is made after the expiration of a month and before the expiration of twelve months after the delivery of the bill, to attach to the order such conditions as it shall think fit, and where the order is obtained upon the application of the client the Court in its wisdom has thought fit to impose the condition that the certificate shall be made within a month (unless the time is extended) or the order shall be of no effect. The reason for this limitation is that the solicitor is deprived of his right to recover the amount of his bill pending the reference. The limitation is to be found only in this particular order: Seton on Judgments, 6th ed. pp. 268–270. The order made upon the application of the solicitor contains no such limitation. The jurisdiction of the taxing master is derived from the order itself, and if the order is of no effect his jurisdiction is gone. That appears from the two cases before North J. No doubt, the power of the Court to order taxation of the bills is not gone, as is shewn by *In re Taylor, Sons & Tarbuck* (2); but after the lapse of twelve months an order for taxation can only be made under special circumstances, and here the order was deliberately delayed by

(1) [1891] 2 Ch. 102.
(2) [1894] 1 Ch. 503.
(3) 3 Q. B. D. 83.
(4) [1896] 1 Ch. 644.

the clients for their own purposes, and there are no special circumstances. An order made in the form which we have in this case is not within sub-rule 57. The Court which makes the order and so founds the jurisdiction of the taxing master does by this particular form of order "otherwise direct" within the meaning of the sub-rule. The concluding words of the order by implication exclude the power of the taxing master to extend the time after the expiration of the month allowed him for making his certificate. After the expiration of the month the order was dead. The true meaning of "extend" is to continue, not to revive. The cases in which an order has been made dismissing an action for want of prosecution are analogous: *Whistler* v. *Hancock* (1), *Wallis* v. *Hepburn* (2), and *King* v. *Davenport.* (3) Those cases were approved and distinguished by the Court of Appeal in *Carter* v. *Stubbs.* (4) In *Collinson* v. *Jeffery* (5) the attention of the learned judge was not called to the approval of those cases by the Court of Appeal, and I submit that the decision of Kekewich J. was wrong and ought not to be followed.

Rowlands, in reply.

VAUGHAN WILLIAMS L.J. This case has taken some time to argue, but the time has not been wasted, and I wish to say that I think that the case has been extremely well argued. In my judgment the question which we have to decide turns upon sub-rule 57 of rule 27 of Order LXV. But although, in my opinion, the decision must turn wholly upon the words of that sub-rule, I propose very shortly to point out how this question arises. Taxation of bills of costs is dealt with under s. 37 of the Solicitors Act, 1843. That section, among other things, limits the power of solicitors to bring actions to recover the amount of their bills of costs. They cannot bring any action until after the expiration of one month after the delivery of a bill of costs. The section then deals with the reference of these bills of costs for taxation. The second paragraph begins:

(1) 3 Q. B. D. 83.
(2) 3 Q. B. D. 84, n.
(3) 4 Q. B. D. 402.
(4) (1880) 6 Q. B. D. 116.
(5) [1896] 1 Ch. 644.

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"And upon the application of the party chargeable by such bill within such month it shall be lawful," and then there are words giving the Court or judge power to tax such bills, and the paragraph concludes as follows: "And the Court or judge making such reference shall restrain such attorney or solicitor . . . . from commencing any action or suit touching such demand pending such reference." The reason for the limitation of one month in such cases as the time within which the party chargeable is to be entitled as of course to this reference is no doubt in part that pending the reference the solicitor will be debarred from enforcing his demand based on his bill of costs. The next paragraph provides for cases in which the application is not made within the month. It says: "And in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor . . . . whose bill may have been so as aforesaid delivered, sent, or left, or upon the application of the party chargeable by such bill, with such directions and subject to such conditions as the Court or judge making such reference shall think proper; and such Court or judge may restrain such attorney or solicitor . . . . from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper." Then follows a proviso that taxation after verdict or after twelve months shall only be allowed under special circumstances. One sees, therefore, throughout these provisions very good reasons why these limitations have been put in in this way, because one finds that pending the reference the right of the solicitor to enforce his bill of costs is really suspended. In this particular case the order was not obtained until a long time after the delivery of the bills of costs. The bills were delivered on January 16, 1902. This order was obtained on December 1, 1902—that is to say, when the twelve months had very nearly elapsed; and the order, though obtained on December 1, 1902, was not in fact served on the solicitors till January 7, 1903—that is almost within a week of the lapse of the twelve months from the delivery of the bills, and more than a month after the

order had been obtained. Under these circumstances, when the matter came before the master it was objected that his jurisdiction was gone, because the order for taxation concludes with these words: "But the said master is to make his certificate in a month (unless the said master shall extend the time to make his certificate), or this order is to be of no effect." It is said that the month having elapsed from the date of the order, the master had no longer any jurisdiction—that is, any jurisdiction under the order as it stood, or any jurisdiction to grant an extension of the time enabling him to make his certificate. It was said that any jurisdiction or power which the master had under the order was totally gone when the month had run out, and that from that time forward the order was dead. With one argument put forward by counsel for the respondents I am inclined to agree—that is to say, that, if you take the actual words of the order itself and have nothing else to assist you at all, primâ facie the power to extend must be exercised within the limit of the month. The case is analogous to the cases which so often arise in respect of submissions to arbitration. You constantly find submissions containing a limit of time within which the award is to be made, and then there is a power given to the arbitrator to enlarge the time for making the award, and it has been held again and again that the power of enlargement must be exercised by the arbitrator within the time limited by the words of the submission itself as being the time within which the award is to be made unless the power of enlargement is exercised by the arbitrator, and, therefore, primâ facie I should have been inclined to read these words as counsel invited us to do, namely, that the power to extend the time must be exercised within the month limited by the order. But, though I should have so read these words apart from anything else, in my opinion we must read this particular order in the light of sub-rule 57. [His Lordship read the sub-rule, and continued:—]

I wish to say with regard to this sub-rule, in the first place, that, in my judgment, it cannot be contended that by the terms of this order the Court or judge has otherwise directed—that is to say, has directed that the taxing master shall not

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have this power of extension. Having said that, I have merely to construe the words of this sub-rule. As I read these words, they are words which by necessary implication affirm that the power thus given to the taxing master to extend the time may be exercised even after the time appointed has elapsed. If that is so, there is an end of all question in this case, because this is not an appeal with reference to the discretion of the taxing master. I am by no means certain that such an appeal ought to be entertained if it was an appeal from his discretion. It is a mere question whether, reading the order and the sub-rule together, the taxing master has this power notwithstanding the expiration of the time. I think he has. But I do not wish to be understood as saying that I think that this is a power which ought to be exercised as of course or freely. I do not think so. The reason why I referred to the terms of s. 37, which expressly provides for the suspension of the rights of the solicitor during the reference, was because I thought that the time limit contained in the common order for taxation made upon the application of the client under this section after the expiration of one month but before the expiration of twelve months from the delivery of the bill was inserted for the express purpose of preventing the reference from being used in a way which would be unjust or oppressive to the solicitor. Under these circumstances, the time limit should not be lightly regarded nor easily dispensed with. When you get an order for taxation made as this one was, very nearly twelve months after the delivery of the bill, and then not served until more than a month after it had been made, and within a very few days of the expiration of the twelve months, it is impossible to suppose that the taxing master would make an order extending the time without very seriously considering whether the circumstances were such as to justify him in so doing, having regard to the object of the statute that the reference should not be used in such a way as to be oppressive. The appeal must be allowed.

ROMER L.J. I have come to the same conclusion. In the first place, let me point out that the cases cited before us really have no application to the point which we have to decide. For

example, cases which were decided under the provisions now embodied in Order LXIV., r. 7, have no application. I mean cases like *Whistler* v. *Hancock* (1), *Wallis* v. *Hepburn* (2), and *King* v. *Davenport.* (3) Those cases were of this kind. An order had been made dismissing an action unless the plaintiff took certain steps within a specified time, and it was held on the terms of the order that if those steps were not taken within the time the action stood dismissed inevitably. In those cases there was no power in the Court to extend the time. But cases of that kind have no application to cases like the present. In those cases nothing could be done to escape the exigency of the order except by way of appeal; but in the case before us and similar cases the arguments which were effective in those cases do not apply, for in the case before us the order for taxation expressly provides for an extension of the time within which the certificate of the taxing master may be made, and within which the order is to be effective. As to the meaning of the provision for the extension of time in the order before us with reference to the question when the extension has to be granted, I shall have something to say presently. But I wish to point out that that order is entirely distinct and different from the orders in the cases under Order LXIV., r. 7. Further, I have to point out that the two other authorities cited, *In re Webster* (4) and *In re Taylor, Sons & Tarbuck* (5), will be found to have no real bearing on the case before us, for in those cases there had been no extension of time by the taxing master. There is, therefore, no case governing the point which is now before us, and it turns entirely on the wording of sub-rule 57 of rule 27 of Order LXV. Now, that sub-rule clearly does generally provide that the taxing master may extend the time within which an act has to be done by him after the expiration of the time appointed for doing that act. I quite agree that without that express power the respondents in this appeal would be clearly right. But there are those words, and I think it would be impossible to say that the sub-rule as a

(1) 3 Q. B. D. 83.
(2) 3 Q. B. D. 84, n.
(3) 4 Q. B. D. 402.
(4) [1891] 2 Ch. 102.
(5) [1894] 1 Ch. 503.

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whole does not apply to the order for taxation in this case. That order is a very common form of order. It is the form which is applicable to all orders obtained by the client after the expiration of one month and before the expiration of twelve months from the delivery of the bill. And if this provision in sub-rule 57 as to extending the time after the expiration of the time appointed does not apply to an order of this kind, it is difficult to see to what order it does apply, for the other orders for taxation do not contain any provision such as we have here limiting the time within which the taxation has to be made. In my opinion sub-rule 57 does apply to this case, and accordingly the taxing master has power to extend the time even though the original time limited by the order has expired. And I may point out that the provision in sub-rule 57 as to extending the time is a very useful provision. Take, for example, a case in which the whole taxation has been practically completed within the month, but owing to the exigencies of his duties the taxing master has not had time to make his certificate. It would be very hard if the taxing master could not extend the time. I think, therefore, that the words to which I have referred in sub-rule 57 are very useful words, and that it would be a great pity if we were compelled to cut down those words in any way. I agree with what was said by my Lord, that it ought not to be considered by the taxing master that the extension of the time is to be a mere matter of course. I think that the taxing master ought to consider carefully in each particular case whether justice does require an extension of time, and upon what terms the extension ought to be granted. Personally I think it possible that, if I had been the taxing master, I should not have extended the time in this case. But that is not now before us. The only point before us is whether there is power in the taxing master to extend the time as he has done. Let me refer shortly to two arguments which have been used against the view which I am expressing. First it is said that under the very terms of the order it ceases to have any effect after the expiration of the appointed time. The certificate not having been made within the month, and there being no extension of time within the

month, it is said that the order was dead and could not be revived. In my opinion that is not the right view to take of this order. I do not think that it was dead in that sense. It is more like a case of suspended animation, if I may be permitted to say so. In my opinion the power to extend the time in this order meant power to extend it according to the rules—that is, according to sub-rule 57. The next argument was this. It is said that the provision as to extension in sub-rule 57 is not operative if the Court or judge shall otherwise direct. With reference to that argument, I would point out that this order contains no direction to the contrary within the meaning of those words. If the order had said "unless the said master shall extend the time to make his certificate within the month," then I agree that the judge would have otherwise directed; but the order does not say that. It may well mean only that the master shall extend the time in accordance with the provisions of sub-rule 57. That argument also fails. For these reasons I think that this appeal must succeed.

STIRLING L.J. I am of the same opinion, and I have very little to add. In my opinion the main question turns upon the true construction of the concluding words of the order for taxation. That order provides that it is to be of no effect unless the taxing master makes his certificate within a month, or unless he extends the time for making his certificate. In point of fact the taxing master has purported to extend the time, and the question is whether he has properly extended it. On the one hand it is contended that these words point to an extension of the time within the month. In that case the master did not grant the extension within the proper time, and the order is of no effect. On the other hand it is said that these words ought to be read as meaning that the master may extend the time in the exercise of any authority which he may possess. In that case, for the reasons which I shall presently mention, I think that the master did extend the time properly. Of these two constructions I prefer the second. Upon the fair construction of the order read with sub-rule 57 I do not see any reason why we ought to treat this order as limiting the

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time within which the extension ought to be made. That being so, it seems to me that sub-rule 57 does plainly confer on the taxing master power to extend the time appointed by this order for making the certificate, even though the application for extension is not made until after the expiration of the time appointed. Consequently I think that the master had jurisdiction to grant the extension of time which he did grant. I think that none of the cases cited before us governs the decision of the present case. As regards the two cases before North J., this point was not covered by his decision; and, although any observations which he made are entitled to great weight, it does not appear that this particular sub-rule was referred to in either of those cases. *Whistler* v. *Hancock* (1) and the other cases of that kind do not apply, because on the construction which I place upon this order it is still an effective order, the master having duly extended the time. I agree that in this case the Court which made the order has not given any direction to the contrary within the meaning of sub-rule 57. I only wish to add that I agree with everything which has been said by the other members of the Court as to the exercise by the taxing master of his discretion to extend the time.

Solicitors: *Bell, Brodrick & Gray, for Macintosh, Dixon & Co., Cardiff; Pritchard, Englefield & Co., for R. Thomas & Francis, Cardiff.*

(1) 3 Q. B. D. 83.

H. B. H.

In re WILMER'S TRUSTS. MOORE *v.* WINGFIELD.

[1902 W. 3845.]

C. A. 1903 June 10, 15, 16.

Devise—Perpetuity—Remoteness—Contingent Remainder—Equitable Estate—Estate Tail—Child en ventre sa mère—Retrospective Operation of Gift—Relation back.

A testatrix devised real estate to trustees upon trust to pay the income to M. during her life, and after her death to stand possessed of the corpus upon trust for the second and every younger son of M., "born or to be born," successively, during his life, with remainder, after the death of each such son, upon trust for his first and other sons, successively, in tail male.

The testatrix died in October, 1880, at which date M. had had (*a*) a son who died in 1887, (*b*) a son who was disqualified by the will from taking under the limitations, and she was pregnant of (*c*) a third son, S., who was born in February, 1881. M. died in 1886, S. being then still living:—

Held, affirming Buckley J., [1903] 1 Ch. 874, that the limitations after S.'s life estate were valid as not transgressing the rule against perpetuities.

For the purpose of deciding a question of perpetuity arising upon a gift such as the above, there is an established rule that a child en ventre sa mère at the time of the testator's death, who is subsequently born, must be treated as having been alive at the testator's death (*Long* v. *Blackall*, (1797) 7 T. R. 100; 4 R. R. 73); and that rule is not to be departed from merely because it may be in the interest of the child to contend that the gift is void as infringing the rule against perpetuity.

APPEAL from the decision of Buckley J. (1)

Anne Wilmer, widow, by her will dated September 25, 1876, devised all her residuary estate to trustees upon the trusts thereinafter declared; and bequeathed all her residuary personal estate to her trustees upon trusts for sale and conversion and reinvestment in real estate to be held upon the trusts thereinafter declared. And the testatrix declared that the trustees should stand possessed of her residuary real estate and the hereditaments purchased as thereinbefore directed (thereinafter collectively referred to as "the Wilmer Estate")

(1) [1903] 1 Ch. 874.

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upon trust to pay the income thereof to her daughter, Anna Maria Moore, during her life, and after her death to stand possessed of the Wilmer estate "upon trust for the second and every younger son of the said Anna Maria Moore, born or to be born, successively, during his life, without impeachment of waste, with remainder, after the death of each such son, upon trust for his first and other sons, successively, in order of seniority, in tail male, so that every elder (except the eldest) son of the said Anna Maria Moore, born or to be born, and his first and other sons and their issue male respectively, shall take before every younger son of the said Anna Maria Moore and his first and other sons and their issue male respectively, with remainder in trust for the second and every other son (except the eldest son) of the said Anna Maria Moore successively in order of seniority in tail," with certain remainders over.

The will also provided that if any person other than the eldest son of Anna Maria Moore should become entitled to another estate, called "the Barne Estate," the next gift in remainder of the Wilmer estate should take effect.

The testatrix died on October 28, 1880. At that date Anna Maria Moore had had one child (Stephen Wilmer Moore, who died on June 17, 1877), and a second son (Randal Kingsmill Moore, who afterwards became entitled to the Barne estate), and she was pregnant of a third son, Stephen Thomas Moore, who was born on February 7, 1881.

Anna Maria Moore died intestate on December 22, 1886.

Stephen Thomas Moore attained twenty-one in February, 1902, and, being advised that the remainders after his life estate were void for remoteness, and that he was entitled to an estate tail, he executed a disentailing assurance, dated September 15, 1902, and took out an originating summons, to which the surviving trustee of the will and R. K. Moore, as heir-at-law and next of kin of the testatrix, were defendants, asking for a declaration that he was entitled as tenant in tail male in possession to the hereditaments and securities representing the Wilmer estate.

Buckley J. held that the plaintiff, Stephen Thomas Moore, was to be treated as having been actually born at the death

of the testatrix, and therefore that the limitations in remainder after his life estate were valid.

The plaintiff appealed.

The appeal was heard on June 10, 15, and 16, 1903.

Buckmaster, K.C., and *Sargant*, for the plaintiff. It is submitted that *Doe* v. *Lancashire* (1) did not lay down as a general rule that a child en ventre sa mère at a particular date is in every case to be treated, when afterwards born, as having been living at a prior date, e.g., for the purpose of avoiding the operation of the rule against perpetuities. In that case the decision was that a will was revoked by marriage and the birth of a posthumous son who was en ventre sa mère at the time of the testator's death. It was for the benefit of the child that he should be treated as having been living at the date of his father's death. There is no decided case which covers the present case. It is submitted that in all the cases in which a child en ventre sa mère at a particular date has been, when born, treated as having been living at a prior date, it has been for his benefit that he should be so treated: *Blasson* v. *Blasson* (2); *In re Burrows.* (3) If the rule were absolute, that for all purposes a child en ventre sa mère is to be treated as then living, a posthumous child entitled by descent to real estate would be entitled to the intermediate rents, whereas it has been held that he is entitled to the rents only as from the date of his birth: *Richards* v. *Richards* (4); *In re Mowlem.* (5)

There is no reported case in which the rule stated to have been laid down in *Doe* v. *Lancashire* (1) has been accepted as a rule of law. If such a rule had existed, it would have been adopted by Chitty J. in *In re Burrows* (3) and by Lord Westbury L.C. in *Blasson* v. *Blasson* (2), where the question was as to the meaning of the word "born." If there is such a rule, of course there is an end of our case; but we submit that there is in fact no such rule. If Buckley J. is right in his interpretation of *Doe* v. *Lancashire* (1), it is no doubt a most

(1) (1792) 5 T. R. 49; 2 R. R. 535.
(2) (1864) 2 D. J. & S. 665, 670.
(3) [1895] 2 Ch. 497.
(4) (1860) Joh. 754.
(5) (1874) L. R. 18 Eq. 9.

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important case upon the doctrine of perpetuities; but it is singular that it is not even mentioned in Lewis on Perpetuities, and it has never been cited as an authority on the law of perpetuities. *Long* v. *Blackall* (1), though not in our favour, is really not against us, for the gift there was to the child en ventre sa mère as persona designata, and all the observations in the case are limited to that class of gift. Our argument is really based upon the last sentence in the judgment of Lord Kenyon C.J. in that case: "It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation," and no doubt the contingency has for some purposes been extended to a child en ventre sa mère at the time of the father's death: *Cadell* v. *Palmer* (2), referring to *Goodtitle* v. *Wood*. (3)

Blackburn v. *Stables* (4) is, as the learned judge has said, not very close to the present: it was merely a question whether a child en ventre sa mère was included in a class gift. The question here is not whether the child en ventre sa mère at the date of the death of the testatrix was a child then "living," but whether at that date the child had fulfilled the description of "the third son" of Mrs. Moore. We say that that description was not in fact fulfilled at the death of the testatrix, for the child might have turned out to be a female, or the pregnancy might have terminated in being abortive; so that we have a description of a person who may not answer that description until too late a period. You could not say at the date of the death that—to use Lord Kenyon's words in *Long* v. *Blackall* (1)—the event of there being a third son "must necessarily happen." The view expressed by Buckley J. at p. 880 of the report below is, we submit, not correct; for if a specified event happens in the future and you are then to refer that event back to a prior date, that is not equivalent to saying that at the prior date a certain thing must necessarily

(1) 7 T. R. 100, 102; 4 R. R. 73.

(2) (1833) 1 Cl. & F. 372, 414; 36 R. R. 128.

(3) (1740) Willes, 211, 213; note to *Long* v. *Blackall*, 7 T. R. 103.

(4) (1814) 2 V. & B. 367; 13 R. R. 120.

happen in the future. The words "must necessarily happen" are of the very essence of the rule.

[ROMER L.J. When the child here was born he certainly was the son entitled to succeed. Now the question is whether he is to be considered as "living" at the death of the testatrix.]

The real question, we submit, is whether at the death he had fulfilled the description.

[STIRLING L.J. The question is, Is the limitation of the estate tail in remainder bad because he was not actually born at the death of the testatrix?]

We say it did not, because the birth of a son was not an event of which it could at that time be predicated that it must necessarily happen. The question whether a gift is valid or not is to be tried by possible, not actual, events: Jarman on Wills, 5th ed. p. 236; *Lord Dungannon* v. *Smith*. (1) The question here is not whether in the ultimate event the third son fulfilled the description or not, but whether at the death of the testatrix he had so fulfilled the description as that no other person could do so. The distinction between a posthumous child of the testator himself and the posthumous child of another person must be born in mind in considering a question of this kind. The child of the testator must necessarily be born within due time after the death; but it is not the fact that the child of another person must necessarily be born within due time afterwards, or indeed at any particular time. In short, if a gift includes objects that are unlawful, it fails whether the object which in its inception is unlawful turns out to be lawful or not. Thus we have here a limitation in tail male to the sons of a person who may, in point of fact, not be living at the death of the testatrix. It is true there is no direct authority to be found upon the present point, but in addition to *Long* v. *Blackall* (2) there is a passage in *Thellusson* v. *Woodford* (3), shewing that a gift to a child en ventre sa mère must be limited to a persona designata. To sum up our argument, the question here is merely this: What is the latest

(1) (1846) 12 Cl. & F. 546, 573-4.
(2) 7 T. R. 100; 4 R. R. 73.
(3) (1799-1805) 4 Ves. 227; 11 Ves. 112; 4 R. R. 205; 8 R. R. 104.

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moment at which a person described as the third son of Mrs. Moore must necessarily be ascertained? We say that the description was as applicable to any child of Mrs. Moore procreated and born after the death of the testatrix as to any child who had been born at that date; and that, the objects being both lawful and unlawful, the devise cannot be good merely because, in the result, there was an object which was lawful.

Warrington, K.C., and *S. Dickinson*, for the defendant, the trustee, and

Austen-Cartmell, for the defendant, the heir-at-law, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion the decision of Buckley J. must be affirmed. It is convenient in this case to begin with reading the statement of facts from the report below. (1) [His Lordship then read that statement, observing that October 28, 1880, the date of the death of the testatrix, was the important date in the case, and continued:—]

Now the question we have to try here is really whether, for the purposes of the rule against perpetuities, the child of which Mrs. Anna Maria Moore was pregnant at the moment of the death of the testatrix is to be treated as a "life in being"; or, to put the question in another way, whether, in view of the facts stated, it can be held that that child was entitled to take notwithstanding the rule against perpetuities, which would really amount to saying that the title to the estate should remain suspended, without any absolute ownership, for a longer time than the rule against perpetuities allows.

Now the case has been put to us in two distinct ways. The argument of Mr. Buckmaster is really based on the suggestion that for the purposes of the rule against perpetuities you ought not to treat a child in ventre matris as a life in being. Buckley J. has come to a different conclusion. Mr. Sargant, in his argument, does not really dispute the conclusion of Buckley J. as to how you ought to treat, for the purposes of the rule, a child in ventre matris; nor does he dispute the

(1) [1903] 1 Ch. 874.

statement of the learned judge that, when the child has been born, and, having been born, proves to be of the sex entitling him or her to take advantage of the limitation, the operation of that limitation is retrospective. Mr. Sargant says that, if you take this will and look at this devise, the result is that you have, besides the description of the sons who had been born and were living persons before the date of the death of the testatrix, a description which has no application to any existing person whatsoever, but a description which, he says, might be answered by the birth of a child born at a time which has no relation whatever to the death of the testatrix. He says that the description of a "third son" would cover a son of Mrs. A. M. Moore who might possibly have been a third son long after October 28, 1880, the date of the death of the testatrix; and that, if that is so, then the rule against perpetuities has been infringed upon, because you have no right to turn to the actual facts of the case and say that as things have turned out there has been no violation of the rule: that it is a sufficient violation of the rule if the terms of the devise are such that it might turn out that the person described might come into existence at a time which would infringe the rule against perpetuities. Those are the two arguments. What Buckley J. does is this. He begins, in his judgment, with a statement of the law which, at all events, Mr. Sargant does not quarrel with at all; and, having stated the law in a way which expressly recognises the proposition that it is not sufficient, in order to get rid of the effect of the rule, to say that, as things have turned out, the rule has not been violated, he says (1): "But if it be a correct rule of law that on the child being born on February 7, 1881, and turning out to be a boy, you must refer back that state of facts to the earlier date, that of the death of the testatrix, and say retrospectively that at that earlier date events had so turned out that the rule against perpetuities could not be infringed because there was a child in existence, although en ventre sa mère, who was a male and who was born alive, then of course it cannot be contested but that the limitation is perfectly good."

(1) [1903] 1 Ch. 880, 883.

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Mr. Buckmaster does not accept that last passage; but we think that that portion of the judgment of the learned judge is perfectly right. Buckley J. points out that all the cases, one after another, deal with this point, and the first case he takes is *Doe* v. *Lancashire* (1), and, after referring to the judgments of Lord Kenyon and Buller J., he says: "But the point comes out most plainly, and, I think, quite clearly, in what Grose J. says at the foot of p. 63 of the report: 'The objection which has been made against this is, that the will speaks from the devisor's death; and that it must be decided whether or not at that moment it be a valid will. I agree that it does speak from that time; but the instant the child is born, he is considered, by retrospect, as born during the parent's life.'" And Buckley J. accepts that as an accurate statement of the law.

But it is urged against the application of that statement of the law, that it was made, not in a case which raised any question upon the rule against perpetuities, but in a case which raised the question whether marriage and the birth of a posthumous child amounted to an implied revocation of a will made before marriage. That is quite true; but Buckley J. goes on and deals with the cases one after another in order to shew that the rule thus laid down by Grose J. is a rule which applies to a case in which you are dealing with the rule against perpetuities.

Then the learned judge refers to, among other cases, *Long* v. *Blackall* (2), and, as Mr. Sargant very frankly said, that case is not an authority in favour of the view put forward by himself and Mr. Buckmaster; but, in my judgment, it is an authority plainly against them. The reason why Mr. Sargant says it is not an authority against him is this—and it is perfectly true—that in that case the child of which the mother was known to be pregnant was referred to as such in the will of the testator. It seems to me, however, that that is quite immaterial, because it is plain, if one looks at the case, that what the Court did hold was this—that, when you have to deal with the rule against perpetuities in order to ascertain what is "a life in being," the Court is bound to hold, as they did hold in that case, that the

(1) 5 T. R. 49; 2 R. R. 535. (2) 7 T. R. 100; 4 R. R. 73.

child who was unborn at the moment you have to deal with, namely, the death of the testator, is, for the purposes of the rule against perpetuities, to be treated as an existing, living child, not from the moment of its being actually born into the world, but during the period of gestation.

In these circumstances, I do not know that it is really necessary for me to do more than say that I entirely agree with the judgment of Buckley J., and with his summing-up of the authorities. What the learned judge says is this (1): "It appears to me that the doctrine is a general one, and that it is applicable to this particular case. What happened here was this. When the testatrix died there was in existence a fœtus, which turned out, when the birth resulted, to be a male child. That was a living thing at the date when the testatrix died. The limitation is perfectly good if that living thing is to be taken to have been at the date of her death that which it turned out to be." With that I entirely agree. I do not think Buckley J. meant to say that, for every purpose of the law, a child, during the period of gestation and before it is actually born, is to be treated as living. In many cases that is not so. Take a case which is very remote from this, but which illustrates what I mean. A child in the womb of its mother cannot be murdered. Of course it is a living child for some purposes, but it must have a separate existence before it can be made the subject of a charge of murder. In Blackstone's Commentaries, 4th ed. vol. i. 129, 130, it is stated that in contemplation of law life begins as soon as an infant is able to stir in the mother's womb: "For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter." Then the learned author goes on: "An infant in ventre sa mère, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited

(1) [1903] 1 Ch. 888.

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to it's use, and to take afterwards by such limitation, as if it were then actually born." And the rule as to a posthumous child being capable of taking in remainder (1) is stated in the same work, vol. ii. 169. I merely mention this because part of Mr. Buckmaster's argument seems to have proceeded upon the assumption that although, according to Buckley J.'s judgment, there was a rule that a child during the period of gestation was to be treated as "a life in being," that was a rule of law applicable in some cases only. In my opinion, upon the authorities, that rule is applicable when you have to deal with the rule against perpetuities. For *that* purpose it is plain that, as soon as the child is born, that satisfies the limitation, and you retrospectively treat the life of that child as "a life in being" at the death of the testator. When you arrive at that conclusion, it seems to me impossible to raise the point that Mr. Sargant raised, though he was quite right in his general statement of the law. That general statement of the law, as I have already pointed out, Buckley J. recognised to the full in his judgment; but you cannot, in applying the law as to remoteness, look at the event which has actually happened, but at the event which might have happened. "If," says the learned judge (2), "the limitations are such that events might have so turned out that the rules as to remoteness would have been infringed, then the limitations fail, although in the events which actually did happen the legal period was not exceeded." But it appears to me that, upon a proper application of the rule I have referred to as regards a child in ventre matris, the moment the child has been born so as to satisfy the limitations, you must treat that event, as it has so turned out, for all purposes with reference to the rule against perpetuities, as having become a fact prior to the death of the testatrix. If so, then Mr. Sargant's argument fails. Mr. Sargant indeed recognised that himself, because his complaint against Buckley J.'s judgment was this. He assented to the proposition that you must refer back to the state of facts as though they had turned out at the earlier date, but he

(1) (1694) *Reeve* v. *Long*, 1 Salk. 227; 10 & 11 Will. 3, c. 16.
(2) [1903] 1 Ch. 879.

says that, although you are to do that, you are not entitled to say that at the moment of death it was known that those events would happen which ultimately did happen. I confess I cannot follow that. It appears to me that when you talk of the relation back of a thing—of a thing being retrospectively recognised—you really are saying that, for the purposes you have to deal with, those facts must be taken as the exact facts at the death of the testator—that is to say, here we must treat it as the actual fact that there was a third son in existence prior to the death of the testatrix. Upon these grounds I am of opinion that the judgment of Buckley J. must be affirmed, and the appeal dismissed with costs.

ROMER L.J. I also think that this appeal fails. As my Lord has gone so fully into the matter I will only say a few words.

For the purpose of deciding questions of perpetuity arising upon gifts in a will of the kind we find in the will in the present case, there is, in my opinion, an established rule that a child en ventre sa mère at the time of the testator's death, who is subsequently born, must be treated as having been alive at the death of the testator. And I do not think that rule should be departed from merely because, for some reason, it is in the interest of the child to contend that the gift is void as infringing the rule against perpetuity. That, to my mind, disposes of the present case, because the plaintiff, the third son, is tenant for life under the will, and the question whether the limitation to his sons in tail male is valid merely depends upon this, whether the plaintiff is to be regarded as living at the death of the testatrix. It appears to me that the rule I have stated applies to the present case, and that the plaintiff is to be regarded as living at the death of the testatrix, and that the limitations here in remainder to his sons are not void as infringing the rule against perpetuity.

STIRLING L.J. I am of the same opinion. The question we have to decide is whether the limitations to the first and

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other sons of the plaintiff under the will of this testatrix are valid or no.

The gift is of certain real estate "upon trust for the second and every younger son of the said Anna Maria Moore, born or to be born, successively, during his life, without impeachment of waste, with remainder, after the death of each such son, upon trust for his first and other sons, successively, in order of seniority, in tail male," with remainders over.

Now, with regard to the rule against perpetuities, it has been stated by Buckley J., if I may respectfully say so, with perfect accuracy; and, indeed, it appears from his judgment that the propositions he stated were not disputed before him. The first proposition he lays down is that (1), in applying the law as to remoteness, you "must look, not at the events which have actually happened, but at the events which might have happened. If the limitations are such that events might have so turned out as that the rules as to remoteness would have been infringed, then the limitations fail, although in the events which actually did happen the legal period was not exceeded."

Then the second proposition the learned judge lays down is this, "that the rule of law as to remoteness admits of absolute ownership being suspended for a life or lives in being and twenty-one years afterwards, and that"—this is the important part of the rule for the present case—"for the purposes of this rule a child en ventre sa mère is treated as a life in being." That statement of the law is in accordance with what is laid down in all modern text-books; and it is not disputed here. It is in accordance with what is laid down in the following passage in Jarman on Wills, 5th ed. p. 216: "It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child en ventre sa mère is considered as a life in being." And in Challis on the Law of Real Property, a work of a most learned and accurate author, it is

(1) [1903] 1 Ch. 879.

stated (2nd ed. p. 171): "The effect of the rule may be summed up by specifying the longest period, commencing with the coming into operation of the instrument under which the interests arise during which the vesting of limitations coming within the scope of the rule, may be postponed, as follows: A life, or any number of lives, in being—the life of a person en ventre sa mère being considered for this purpose a life in being—and twenty-one years after the dropping of the life, if only one, or after the dropping of the last surviving life, if there be more than one. And at the expiration of the aforesaid period, the executory interest may vest in a person en ventre sa mère." And on p. 170 Mr. Challis says: "It has not been doubted, since the case of *Long* v. *Blackall* (1) that for the purposes of the rule, a life in being may be the life of a person en ventre sa mère at the date of the limitation." I agree in taking that view of the decision in *Long* v. *Blackall*. (1)

Now, what do we find here? The period to which we have to look in the application of the rule is, as is well settled, the death of the testatrix when her will came into operation. What, then, was the state of facts at that time? The facts were that Mrs. Moore had had one child who had died previously, and also a second son who was living, and she was pregnant of a third son who is the present plaintiff. He was born on February 7, 1881, the testatrix having died in October of the previous year. How is the rule against perpetuities to be applied to such a case as this? The question being whether the limitations in favour of the children of a particular younger son are valid or no, we have to inquire whether the life of the parent was in existence at the date of the death of the testatrix. That is the point to which our inquiries must be directed. There can be no question at all but that, under the limitations, the plaintiff takes an estate for life at all events. To answer the question whether the limitation to his children takes effect, we have to go back to the death of the testatrix and inquire whether this particular parent was in existence at that time. If he was, the gift is as valid as if this son of Mrs. Moore had been then actually born; if he

(1) 7 T. R. 100; 4 R. R. 73.

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was not, the gift fails. Now, we find that he was then en ventre sa mère. If so, his life must, for the purposes of the rule, be treated as a life in being. That being so, it seems to me the judgment of the Court below was right, and this appeal fails.

Solicitors for plaintiff and defendant, R. K. Moore: *Evans, Foster & Wadham.*

Solicitors for trustee: *Tylee & Co.*

G. I. F. C.

FARWELL J. 1903 *May* 4.

In re METCALF. METCALF *v.* BLENCOWE.

[1881 M. 2308.]

Administration — Abatement — Annuities Immediate and Reversionary — Deficient Estate—Mode of Apportionment—Hotchpot.

A testator gave an annuity of 400*l.* to his wife, to be paid in preference to all other bequests, and subject thereto he gave an annuity of 150*l.* to his son and of 450*l.* to Mrs. S. for life with remainder to her children in the proportions therein mentioned; and he gave his trustees power, if the income was insufficient, to raise the annuities by mortgage of his real estate. For five years all the annuities were paid in full, partly out of moneys raised by mortgage. The estate was then found insufficient, and for the rest of the widow's life her annuity only was paid, and this had to be paid partly out of capital. On the widow's death the residue of the estate was insufficient to pay the arrears of annuities. In settling the proportions of abatement the question was raised whether the sums received by the immediate annuitants during the first five years ought to be brought into hotchpot:—

Held, on principle, that as the income of the testator's estate, during the first five years after his death, could never have been applicable in payment of the reversionary annuities, the annuitants in possession were not bound to bring into hotchpot sums received out of income:

Held, also, on the construction of the particular will, that the trustees might have exhausted the whole of the estate in payment of the immediate annuities, and therefore the sums paid out of capital need not be brought into hotchpot.

Potts v. *Smith*, (1869) L. R. 8 Eq. 683, considered.

HENRY CHRISTOPHER METCALF, the testator in this action, who died in 1881, by his will dated November 9, 1880, after

giving his wife the right to reside in his house and the use of certain lands and furniture for her life, gave her for her life an annuity of 400*l.*, and charged the same upon his residuary personal and his real estate, to be paid out of the income and rents and profits in preference to all other annuities charged or interests given by his will; but if the said income and rents and profits should be insufficient, he directed the deficiency to be made good out of the capital of his residuary personalty and his real estate in preference to all other charges. He gave an annuity of 150*l.* to his son Henry George Price Metcalf during his life or until bankruptcy or alienation, and an annuity of 450*l.* to Hannah Holmes Southgate for her life, with remainder after her death to her daughters Mindore Metcalf Southgate and Jessie Lily Metcalf Southgate and her sons Ernest Metcalf Southgate and Maitland Metcalf Southgate for their lives, to be paid to them in the proportions therein mentioned.

And he empowered his trustees to raise all the said annuities, or so much thereof as the income of his residuary personal estate should not be able to pay, out of the rents and profits of the hereditaments and premises thereby devised other than those of which the use was given to his wife for life, and, if the rents and profits should be insufficient, by mortgaging or charging the said hereditaments and premises or any part thereof for the residue of a term therein mentioned, but not by sale.

Subject to the annuities, he gave the income of his residuary personal and real estate to his wife for life, and devised his real estate to his son for life with remainders over.

Shortly after the testator's death an action was commenced for the administration of his estate.

The annuities of 150*l.* and 450*l.* were paid in full to Henry George Price Metcalf and Hannah Holmes Southgate until October 16, 1886, partly out of income and partly by sums raised by mortgage of the testator's real estate. By that date all the testator's estate was realized and represented by funds in court, and it was found insufficient to pay out of income even the widow's annuity of 400*l.* After that date nothing had been paid on account of the annuities given to the

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testator's son and Mrs. Southgate, but the widow's annuity had been paid, partly out of income and partly out of capital. The testator's son died in 1891. The widow died on January 29, 1903, having been paid her annuity in full up to October 16, 1902. Hannah Holmes Southgate died on September 21, 1900.

The testator's estate was represented by two sums of 127*l.* 13*s.* 5*d.* India 3 per cent. Stock and 1990*l.* like stock in court.

This was a petition presented by the legal personal representatives of the testator's widow and of his son, asking for payment of the arrears of the widow's annuity since October, 1902, to the legal personal representatives of the widow, and that the residue of the funds in court might be distributed between the representatives of the son and of H. H. Southgate, and her children.

Butcher, K.C., and *Vaisey*, for the petitioners. The rule as to abatement of annuities was laid down in *Todd* v. *Bielby*. (1) That case applied the general rule as to valuation laid down in *Wroughton* v. *Colquhoun* (2) to a case like the present, where some of the annuitants are dead. The value of expired annuities must be taken to be what the deceased annuitants would have received if the estate had been sufficient, and the value of subsisting annuities at the amount of arrears plus the present value of the annuities. That rule was followed in *Heath* v. *Nugent* (3) and *In re Wilkins*. (4) In *Potts* v. *Smith* (5) the same rule was followed, but in the order a clause was inserted that the annuitants should bring into hotchpot the moneys they had received. On this point there must have been some mistake. As between a present annuity and a reversionary one, payments out of income cannot be brought into hotchpot, for they never could be applicable to the payment of the reversionary annuitant.

Upjohn, K.C., and *Watson*, for the mortgagees of Mrs.

(1) (1859) 27 Beav. 353.
(2) (1847) 1 De G. & Sm. 357.
(3) (1860) 29 Beav. 226.
(4) (1884) 27 Ch. D. 703.
(5) L. R. 8 Eq. 683.

Southgate's annuity. In *Potts* v. *Smith* (1) James L.J. (then Vice-Chancellor) only intended to follow *Todd* v. *Bielby* (2), not to establish a new precedent. The report in the *Law Journal* (3) states the facts a little more fully, but the head-note says that *Todd* v. *Bielby* (2) furnishes the rule, and the reports in the *Weekly Reporter* (4) and the *Law Times* (5) both bear out what is stated in the head-note in the *Law Reports*, that the case only followed *Todd* v. *Bielby*. (2) The point as to hotchpot as between the present and reversionary legacies was not argued, and it is quite against principle to bring into hotchpot income which would in no case form part of the fund for payment of the reversionary annuities. It would be contrary to the very meaning of hotchpot as explained by Sir George Jessel M.R. in *In re Rees*. (6) So long as the annuity was paid the annuitants had no right to have it valued: *In re Hargreaves*. (7) On the construction of this will the power to raise by mortgage enabled the trustees to apply the whole estate in paying the subsisting annuities.

Dickinson, for the trustees.

P. F. Wheeler, for the reversionary annuitants. Both on principle and on authority the annuitants must bring into hotchpot all they have received. Where abatement is necessary the right of annuitants is to have their annuities valued as at the testator's death. It makes no difference that some of them are reversionary, except that the valuation will take that fact into account: *Innes* v. *Mitchell*. (8) *Potts* v. *Smith* (1) is exactly on all fours. There is no real difference between the reports, but the fuller statement in the *Law Journal* makes it clearer that the annuitants whose annuities were given at once were ordered to bring all they had received into hotchpot in favour of the reversionary annuitants. The power to mortgage makes no difference: it is inserted for the benefit of all the annuities, not of some as against others. As soon as the estate was found to be deficient, the reversionary annuitants

(1) L. R. 8 Eq. 683.
(2) 27 Beav. 353.
(3) 39 L. J. (Ch.) 131.
(4) 17 W. R. 1083.
(5) 21 L. T. 54.
(6) (1881) 17 Ch. D. 701.
(7) (1890) 44 Ch. D. 236.
(8) (1846) 1 Ph. 710.

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could have claimed to have their annuities secured. From that time capital and income formed one fund which was divisible among all the annuitants.

FARWELL J. This petition raises a very curious point. [His Lordship stated the will and the facts as to the arrears of the annuities.] In 1883 an order was made directing a sum to be raised by mortgage of the testator's real estate, a part of which was to be applied in discharging the arrears of the annuities in possession. The question which now arises in dividing the fund in court is, Ought the annuitants in possession to bring into hotchpot the amounts they have received? Or ought the division to be in accordance with the declaration contained in *Potts* v. *Smith* (1), as distinguished from the subsequent directions in the order. I am of opinion that the real decision of James V.-C. is expressed in the declaration in *Potts* v. *Smith.* (1) I cannot account for the subsequent additions and directions for bringing into hotchpot which appear in the order there, because they seem to me to be inconsistent with the words of the Vice-Chancellor: "I can see no difference in principle, where the annuity has been given in expectancy on the death of another person."

The view taken by Lord Romilly in *Todd* v. *Bielby* (2), which was followed by James V.-C., appears to me to be that when the period is ascertained at some period after the death of the testator, you reckon the values according to the events which have happened, and you only value what is necessary to be valued, namely, the interest, in futuro, of such of the annuitants as may still be living. To bring into hotchpot all that has been paid in the past would certainly be a novel application of the principles of any of the cases that I have seen. If the testator's estate is proved to be insolvent at his death, so that no distribution can take effect at all without ascertaining the abatement required on all the annuities, the Court cuts the knot by treating every one as having an interest which is immediately assessable in value, and it values reversionary interests as well as interests in possession, because it is

(1) L. R. 8 Eq. 683, 687. (2) 27 Beav. 353.

going to distribute the estate. But that is merely a rule of the Court, and to some extent defeats the object of the testator, who did not intend a person—to whom he has given on the death of A. 100*l.* a year—to receive 500*l.* down before the death of A. The Court has to do the best it can under circumstances which the testator did not contemplate. But where the estate is only ascertained to be insufficient at some period after the death, and the distribution has gone on down to that period, in none of the cases to which I have been referred has there been any bringing into hotchpot of the sums which have been paid, and it appears to me that it would be unjust to require it. Bringing into hotchpot is applied for the purpose of equally dividing the subject-matter of a gift amongst the objects to whom that gift is made. If that subject-matter is income which is given to A. for life, and after his death to B. for life, the income which accrues to A. during his own life is something with which B. has nothing whatever to do. Here the annuitants in possession take certain income, in respect of which the annuitants in reversion could have no claim at all, because that income was earned, and was expended, before their annuities arose, and not only so, but the tenant for life took the residue of that income, during the lifetime of the annuitants, until these payments were stopped. So far, therefore, as regards the sums paid to the annuitants in possession out of income in the past, it appears to me that on no principle of equity would it be right to make them bring the moneys paid them into hotchpot.

Then it is said that the particular sum represents corpus, and the annuitants in possession have, under the order of Court in 1883, had sums paid to them which were raised out of corpus under the power of mortgaging, and these at any rate must be brought into hotchpot. That raises a question of construction under the will. [His Lordship read the power to raise the annuities by mortgage, and continued:—]

The testator has here obviously contemplated the possibility that the corpus will be paid to the annuitants in order to discharge their annuities. That appears to me absolutely inconsistent with any direction for bringing into hotchpot, for

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the testator does necessarily, by this provision, shew an intention to prefer the annuitants in possession over those in reversion; under this power of mortgaging corpus where the income is insufficient, the annuitants in possession get paid the full amount of their annuities, down to their own death, so far as the value of the property is sufficient to pay them. If you once arrive at that conclusion, all ground for raising an equity to bring into hotchpot disappears, for that equity depends, as has already been said, on the intention to divide the subject-matter of the gifts among certain persons equally. The result is that, on the construction of this particular will, I hold that this direction for raising the annuities out of corpus by mortgage negatives any idea of bringing into hotchpot the sums which have been paid to the annuitants in possession. The order will be a declaration in the form of that in *Potts* v. *Smith* (1) without any directions as to hotchpot.

Solicitors: *Ernest Bevir; Stileman & Neate; Ikin & Crowther; Tamplin, Tayler & Joseph.*

(1) L. R. 8 Eq. 683.

J. R. B.

MULLIS *v.* HUBBARD.

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1903

May 8, 9.

[1902 M. 3556.]

Local Government—Urban Authority—Building Line—Approval of Plans—Erecting Premises in advance of Building Line—"Written Consent" of Urban Authority—Indictable Offence—Statutory Penalty—Special Damage to adjoining Owner—Whether Action for Damages maintainable—Public Health (Buildings in Streets) Act, 1888 (51 & 52 *Vict. c.* 52), *s.* 3—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 156.

The Public Health (Buildings in Streets) Act, 1888, s. 3, enacts that it shall not be lawful "without the written consent of the urban authority" to erect a building in any street beyond the front main wall of the building on either side thereof; and "any person offending against this enactment shall be liable to a penalty not exceeding 40*s.* for every day during which the offence is continued after written notice in this behalf from the urban authority":—

Held, that the offence prohibited by the section was one compound offence, consisting of building without consent and continuing after notice, for which a penalty was imposed to be exacted by the urban authority, and therefore gave no cause of action to a private individual to whom special damage was occasioned.

Rumball v. *Schmidt*, (1882) 8 Q. B. D. 603, discussed.

A builder submitted his plans of a proposed building to an urban authority in accordance with their by-laws. The plans shewed that the proposed building would infringe the building line. The plans were considered and passed by a committee of the urban authority, and then stamped "Approved" by the chairman of the committee. At a subsequent meeting of the general council of the urban authority a resolution was passed by which various acts and proceedings of the committee, including the passing of the said plans, were approved and adopted; and at the next general meeting of the council the minutes of the previous meeting were read and confirmed, and then signed by the chairman of the council:

Held, that the above proceedings of the urban authority constituted a sufficient "written consent" for the purposes of s. 3 of the Act.

THE corporation of the borough of Loughborough were the urban sanitary authority for the district of Loughborough.

The plaintiff was the owner of two villas situate in Corporation Road, Loughborough, which he built in the year 1900 in accordance with plans previously deposited with the corporation, as required by their by-laws, and approved by them, the line of the main buildings being set back six feet from Corporation

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Road, which was admittedly a new street. These villas were the first residences erected in the road.

The defendant was the owner of the plot of land adjoining the plaintiff's villas, and on November 12, 1900, he served upon the corporation, in accordance with their by-laws, a written notice of his intention to build a stable and coach-house upon his plot of land. The notice was accompanied with plans which shewed that the proposed buildings would front Corporation Road and would be erected on the side next to the plaintiff's premises, and would be built right up to the edge of the road, thereby coming six feet in advance of the building line.

On November 20, 1900, the borough surveyor certified that he had examined the defendant's plans for the erection of his stable and coach-house in Corporation Road, and also the site of the proposed buildings; that the plans were in accordance with the provisions of the Public Health Act, 1875, and the requirements of the by-laws of the corporation, with the following exception: "Manure pit to be covered over." On November 26, 1900, at a meeting of the highway and estates committee of the corporation, a resolution was passed approving the defendant's plans subject to an amendment, and the plans were then stamped by the chairman of the committee with the words "Approved subject to amendment." The amendment was that the manure pit was to be covered over, which was complied with by the defendant. On December 3, 1900, at a general meeting of the council of the corporation, a resolution was passed by which various acts and proceedings of the said committee, including the above resolution as to the defendant's plans, were approved and adopted; and at the next general meeting of the council held on January 7, 1901, the minutes of the previous general meeting were read and confirmed, and then signed by the mayor, as the chairman of the council. No consent other than the above proceedings was given by the corporation, and the defendant completed his said buildings early in 1901.

In October, 1902, the plaintiff wrote to the corporation complaining that the defendant had erected his buildings in

contravention of the provisions of the Public Health (Buildings in Streets) Act, 1888, and of the by-laws of the corporation, and had seriously depreciated the value of his villas, and requesting the corporation to exercise its powers under the Act and their by-laws to compel the defendant to remove so much of his buildings as were within six feet of Corporation Road. The corporation declined to move in the matter. Thereupon the plaintiff brought this action, alleging that the defendant had erected his buildings in breach of the Public Health (Buildings in Streets) Act, 1888, and without the written consent of the corporation, and that by reason of these unlawful acts of the defendant the public rights conferred by the said statute had been infringed, and he (the plaintiff) had suffered special damage, and his adjoining property had been greatly depreciated in value, and claiming a mandatory injunction and damages. The defendant did not admit the allegations of the plaintiff, and submitted that the plaintiff had no cause of action.

Upjohn, K.C., and *McCurdy*, for the plaintiff. The question turns on the true construction of s. 3 of the Public Health (Buildings in Streets) Act, 1888. That section repeals s. 156 of the Public Health Act, 1875 (1), but for the present purpose the two sections are in substance the same. Sect. 3 deals with two offences. The first clause is a general prohibition against building without the written consent of the urban authority. No penalty is imposed for a breach of that clause, which is therefore an indictable offence at common law. The second

(1) Public Health (Buildings in Streets) Act, s. 3: "Sect. 156 of the Public Health Act, 1875, is, save as hereinafter mentioned, hereby repealed, and in lieu thereof it is hereby enacted that it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building or either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same.

"Any person offending against this enactment shall be liable to a penalty not exceeding 40s. for every day during which the offence is continued after written notice in this behalf from the urban authority."

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clause of the section imposes a penalty for continuing the offence after notice. The judgment of Huddleston B. in *Rumball* v. *Schmidt* (1) supports this view. He says: "It is possible that for the offence specified in the first clause the appellant would have been liable to an indictment, but the following clause provides what the penalty shall be, not for building the addition, but for continuing it after notice"; and later on: "the penalty is imposed not in respect of the offence but in respect of the continuing it, and the penalty clause is part of the same section which declares the offence." The section was also considered in *Blackpool Corporation* v. *Johnson*. (2) If this is the true view, the plaintiff can maintain this action; for it is well settled that where an indictment will lie for something done to the general damage of the public, a private individual can sue who suffers special damage caused by the offence: *Rex* v. *Wright* (3); *M'Kinnon* v. *Penson* (4); *Rex* v. *Gregory* (5); *Reg.* v. *Buchanan* (6); *Boyce* v. *Paddington Borough Council*. (7) The object of the section is to prevent injury to the adjoining owner—that is, to give him a right of action in cases where he suffers special damage. The plaintiff here has suffered special damage to the extent of 200*l*. In the next place we contend that the "written consent" of the urban authority was not obtained. It was not sufficient for the defendant merely to obtain the approval of his plans. In order to enable a person to erect a building in advance of the building line he must, in addition to the passing of his plans, specially apply for and obtain the previous written consent of the urban authority: *Yabbicom* v. *King*. (8)

Butcher, K.C., and *Lyttelton Chubb*, for the defendant, were not called upon.

FARWELL J. The plaintiff describes himself as a burgess of the borough of Loughborough, and the defendant is also a burgess of the borough. The plaintiff asks for a declaration

(1) 8 Q. B. D. 603, 608–9.
(2) [1902] 1 K. B. 646.
(3) (1758) 1 Burr. 543.
(4) (1853) 8 Ex. 319, 327.
(5) (1833) 5 B. & Ad. 555.
(6) (1846) 8 Q. B. 883.
(7) [1903] 1 Ch. 109.
(8) [1899] 1 Q. B. 444.

that the erection of a stable and coach-house by the defendant was contrary to and in violation of the Public Health (Buildings in Streets) Act, 1888. He also asks for a mandatory injunction to compel the defendant to pull them down, and damages and costs. The premises in question were built as long ago as the beginning of 1901, and the writ was not issued until December 23, 1902. In applications under any ordinary equitable or common law right it is difficult to see how, after a delay of two years, the plaintiff could have any chance of getting a mandatory injunction such as he wishes. This is the first time so far as I am aware that any private individual has attempted to assert a private individual right arising out of this section or any similar section in the Public Health Acts. The case has been argued on the question whether s. 3 of the Act is a general prohibitory clause creating a new offence for which an indictment will lie, or whether it is a prohibitory particular clause specifying only a particular remedy for the offence—as stated by Lord Mansfield in *Rex* v. *Wright* (1)—in which case such particular remedy is the only one that can be pursued. The section in substance re-enacts s. 156 of the Public Health Act, 1875. [His Lordship read the section.] Apart from decision, I should have thought that it was clear that the offence was the building or erecting or bringing forward of any house or building in any street beyond the building line. First of all, that is prohibited, and then the section goes on: "Any person offending against this enactment"—What enactment? Why, the enactment that it shall not be lawful to erect or bring forward any house—is liable to a penalty. What is the penalty for? The penalty is for doing the particular act prohibited and the only act prohibited. How is the penalty measured? Forty shillings for every day during which the offence is continued from the period beginning from the receipt of the written notice from the urban authority. To my mind the section is absolutely clear, and I do not think there is anything in the two cases which have been referred to which is inconsistent with that view. It is impossible, I think, to adopt the plaintiff's

(1) 1 Burr. 543.

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construction, namely, that the section in the first clause has created a distinct offence for which there is no penalty, and that the penalty imposed by the second clause is for the offence of continuing after notice; it would I think be too absurd to say that the Act of Parliament has, in one and the same section, first created an offence without a penalty, and then created a penalty without an offence. If you read the two clauses together as one section, as I understand Grove J. says you ought to do, there is one offence then with a penalty imposed, and it therefore comes within the rule laid down by Lord Mansfield. It is said that *Rumball* v. *Schmidt* (1) is against that view. Now, the decision in that case was on s. 156 of the Public Health Act, 1875, that an information for penalties could be laid after the six months limited by s. 252 had expired. As I understand it, the learned judges held that the two portions of the section were to be read together so as to make one offence created by building and continuing, so that the penalty is imposed on the compound offence. If that be so, there is nothing inconsistent in their decision with what I have held, because, although both the learned judges say it is possible that for the offence specified in the first clause of the section the appellant would have been liable to an indictment, they do not so decide, nor is it any part of their decision. What Grove J. says (2) is quite inconsistent with such an idea. He says: "Here the provision with respect to penalties for a continuing offence is part of the whole section. Without it the first part of the section becomes almost meaningless; it would not amount to more than a bare expression of opinion by the Legislature. The offence is created by the first part of the section, and the second, which is the punitive part, provides the penalty," that is, the penalty for the offence created by the first part of the section. The learned judges there arrived at the conclusion that the two portions of the section could be read together so as to make a sort of compound offence of the erection and the continuing after written notice. Then there is the case of *Blackpool Corporation* v. *Johnson* (3), before the Divisional Court. Now

(1) 8 Q. B. D. 603. (2) 8 Q. B. D. 606. (3) [1902] 1 K. B. 646.

that, to my mind, is quite inconsistent with the contention that I have heard from the plaintiff here. There the person against whom proceedings were taken was a purchaser from the builder who had erected the offending building, and it was said that he was continuing and therefore was guilty of an offence under the same section, the offence being derived in some manner out of the penalty portion of the section. The Court held there was no offence committed by the person who simply maintained the house, after notice from the urban authority, in the same state as it was in at the time he bought it. It was not necessary for them to determine whether there was an offence by erecting and continuing, but it seems to me to follow from their judgment that it was so; because, if it were not so, they would have arrived at the conclusion that the penalty was declared against the person who first erected irrespective of continuance, which would be inconsistent with *Rumball* v. *Schmidt* (1), or that there was no penalty at all attached to the continuation by itself. At any rate, whatever be the true view of that decision, it seems to me to be absolutely unimpeachable, and certainly in no way to conflict with but rather to support the view I take in the present case. I have also heard arguments as to the general intent and meaning of the Public Health Acts, and it is said that I ought to find some intention to protect the individual next-door neighbour as distinct from the whole body of corporators of the borough or the whole of the inhabitants of the particular district. In my opinion that is not the true view. If the next-door neighbour has any common law rights, they are left untouched and he can assert them. If he has no common law rights, the Legislature under the Public Health Acts intended, not to create rights in individuals, but general rights for the benefit of the inhabitants of a particular borough or district. The very words of this section appear to me to exclude any notion of individual right, because the sole arbiter whether the house shall or shall not be brought forward is the urban authority. They may give their written consent and, if they do, the next-door neighbour has no ground of complaint. If

(1) 8 Q. B. D. 603.

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individual rights had been intended to be created, the urban authority would not have been given power to override those rights. The intention was to provide for the public health by seeing that the streets were not unduly narrowed, and that there was no undue blocking of way or air. Certainly it would be an unfortunate construction that would allow the numerous individuals in a street to bring their private actions against a man who had built a few feet in front of the line allowed when, as in this case, the urban authority decline to complain or interfere in any way.

The view that I have taken of the first point renders it unnecessary for me to express any opinion on the second, namely, whether the urban authority had in fact given their written consent. I will only say that I should be very unwilling to hold that when resolutions are passed approving of plans which have been submitted in the usual way—which plans on the face of them shew the frontage—and those resolutions are subsequently confirmed and signed by the proper officer—it is open to the urban authority or any one else to say afterwards that "written consent" had not been given because such consent had not been asked for and given in terms. One has to bear in mind that the builder in submitting his plans shewed fairly well what he intended to do. He brought them before experts, whose business it was to know these local Health Acts and to administer them daily. It ought to be present to their minds that the man cannot build without their consent in the particular way in which he proposes to build. After allowing, as in this case, the builder to complete his buildings and a year or two to elapse before action is taken, it would require a great deal to persuade me, on materials such as I have in the present case, to hold that the urban authority had not in fact given their written consent. When the written consent of the urban authority is spoken of, it appears to me that such consent may properly be testified by resolutions approving of the particular plans, if those plans do fairly shew that which is intended. Doubtless it would be safer, if practicable, to get the local board to pass a resolution expressly consenting to the particular thing required; but, having regard

to the way in which business is carried on, I think it would be somewhat extravagant to hold that it was absolutely necessary that there should be an express resolution passed that the particular builder should be allowed to build, not merely in accordance with plans which shew the intended extension beyond the front wall of the adjoining houses, but also stating in so many words that he is to be allowed to build beyond such front walls. I hold, therefore, that this action fails, and must be dismissed with costs.

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Solicitors for plaintiff: *Field, Roscoe & Co., for Moss & Taylor, Loughborough.*

Solicitor for defendant: *F. Fitz-Payne, for Clifford, Perkins & Clifford, Loughborough.*

H. L. F.

BRITISH ASBESTOS COMPANY, LIMITED *v.* BOYD.

FARWELL J. 1903 *May* 27.

[1903 B. 1366.]

Company—Disqualified Directors—Article validating Acts of de facto Directors—Appointing Directors—Summoning General Meeting—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 52, 67; *Table A, art.* 57.

No. 108 of the articles of a company provided that all acts done at any meeting of directors or by any person acting as a director should, notwithstanding that it should afterwards be discovered that there was some defect in the appointment of such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director. The article also provided that two directors should form a quorum; that the continuing directors might act notwithstanding any vacancy in their body; that the directors might fill up any casual vacancy; that the directors might appoint one of their body to be managing director; and (art. 89) that the office of director should (inter alia) be vacated—(*a*) if he accepted or held any other office under the company; (*b*) if he by notice in writing to the company resigned his office.

B., R., and M. were directors of the company. On October 23, 1902, B. was appointed secretary of the company, which office he resigned on December 2. At a board meeting held on December 4, and attended only by B. and R., a letter was read from M. resigning his directorship, and B. and R. then passed a resolution appointing B. managing director of the company. At the next board meeting, attended only by B. and R., a resolution was passed electing D. a director of the company. These

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three continued to act as directors, and on March 3, 1903, issued notices convening the annual general meeting of the company. B., R., and D. acted in good faith, and the fact that B. had under art. 89 (*a*) vacated his directorship on October 23 and the subsequent irregularities were not brought to their attention until after March 3 :—

Held, that the irregularities in the appointment of B. and D., and the subsequent acts of B., R., and D., were validated by art. 108 and s. 67 of the Companies Act, 1862, and that they were the duly constituted board of directors.

Dawson v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6, followed.

THE plaintiff company was incorporated on January 21, 1899, under the Companies Acts, 1862 to 1893, with a memorandum and articles of association. The material articles were the following :—

Art. 1 : " Words importing the singular number only include the plural number, and vice versâ."

Art. 84 : " The first directors of the company shall be W. Menzies, J. Boyd, and J. Reid ; and the said W. Menzies shall be chairman."

Art. 85 : " The qualification of every director shall be the holding of shares or stock of the company of the nominal value of 500*l*."

Art. 88 : " The continuing directors may act notwithstanding any vacancy in their body . . . ."

Art. 89 : " The office of director shall be vacated :—

" (*a*) If he without the sanction of any general meeting accepts or holds any other office under the company except that of managing director." [This clause is in substance the same as art. 57 of Table A.]

" (*b*) If he become bankrupt.

" (*c*) If he be found lunatic.

" (*d*) If he cease to hold the required amount of shares to qualify him for office, or do not acquire the same within one month after election or appointment.

" (*e*) If he absents himself from the meetings of the directors during a period of six calendar months without special leave of absence from the directors.

" (*f*) If by notice in writing to the company he resigns his office."

Art. 95: "Any casual vacancy occurring among the directors may be filled up by the directors."

Art. 98 empowered the directors to appoint one of their body to be managing director.

Art. 102: "Until otherwise determined two directors shall form a quorum . . . ."

Art. 103: "A director may at any time summon a meeting . . . ."

Art. 105: "A meeting for the time being at which a quorum is present shall be competent to exercise all or any of the authorities, powers, and discretions by or under the regulations of the company for the time being vested in or exercisable by the directors generally."

Art. 108: "All acts done at any meeting of the directors or of a committee of such directors or by any person acting as such director shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors or committee or person acting as aforesaid, or that they or any of them were disqualified, be valid as if every such person had been duly appointed and was qualified to be a director."

Art. 133 directed that a balance-sheet should be laid before the company at the ordinary meeting in every year.

Art. 134 required that every such balance-sheet should be accompanied by a report of the directors . . . . and that the report and balance-sheet should be signed by two directors.

Menzies, Boyd, and Reid each held the necessary share qualification for a director. In September, 1899, the plaintiffs Brauns and Perotti were elected directors of the company. They both resided in Italy and looked after the company's business there, and very rarely attended the meetings of the directors in London. The last board meeting they attended in London was on July 3, 1902.

On October 23, 1902, a board meeting was held at which Menzies, Boyd, and Reid were present. At this meeting a resolution was passed removing the then secretary from his office; and by another resolution Boyd was appointed the secretary of the company at the same salary as the late

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secretary. From this date Boyd acted as the secretary of the company until December 2, when he resigned that office. On December 4 a meeting purporting to be of the board was held at which only Boyd and Reid were present. At this meeting a letter was read from Menzies resigning his office of chairman and director of the company, and his resignation was accepted. Boyd and Reid then passed a resolution purporting to appoint Boyd chairman and managing director of the company. On January 5, 1903, another board meeting was held at which only Boyd and Reid were present, and at this meeting a resolution was passed purporting to appoint the defendant Methven a director of the company. Subsequent board meetings were held by these three as directors, and on March 3 they issued a notice convening a general meeting of the company for March 25 to receive the directors' report and to pass the accounts. The report and balance-sheet were signed by Boyd and Reid as directors, and the report recommended the election of the defendant Brooks as a director. On March 16 the plaintiffs Brauns and Perotti and three other shareholders issued a notice calling an extraordinary general meeting of the company for March 31 for the purpose of electing four directors. This notice stated that the meeting was convened pursuant to s. 52 of the Companies Act, 1862, the notice of March 3 calling the general meeting for the 25th inst. being inoperative and invalid by reason of there being no board of directors competent to summon such a meeting. The plaintiffs Brauns and Perotti attended the meeting held on March 25, protested against the validity of the meeting, and then withdrew. At this meeting the usual business was transacted and the defendant Brooks was elected a director, and a resolution was passed confirming the appointment of Boyd as chairman of the company. The meeting of March 31 was also held, when the plaintiffs Brauns and Perotti and two others were elected directors. The plaintiffs Brauns and Perotti then commenced this action in the name of the company, and on behalf of themselves and all the other shareholders of the company other than the defendants, against Boyd, Reid, Methven, and Brooks, and claimed a declaration

that the defendants were not directors of the company, and an injunction to restrain them from acting as directors. The plaintiffs now moved for an interim injunction, which was treated as the trial of the action. There was a cross-motion by the defendants to strike out the name of the company as plaintiff on the ground that it had been used without authority.

It appeared from the evidence that the fact that Boyd had under art. 89 (*a*) vacated his office of director and the consequent irregularities were not brought to the knowledge of the defendants until after March 3, and there was no evidence that Boyd and Reid had not acted in good faith in all that they did. It also appeared that the plaintiffs and their supporters held 1344 shares and the defendants and their supporters held 1116 shares in the company.

Upjohr, *K.C.*, and *Martelli*, for the plaintiffs. Under art. 89 (*a*) Boyd vacated his office of director on October 23, and under clause (*e*) of the same article Brauns and Perotti ceased to be directors on January 4. As from December 4 Reid was the only director in England, and there was no valid quorum of directors, and everything that he and Boyd did was irregular and void. Therefore Methven was not duly appointed a director, nor was the general meeting of March 25 duly convened, nor were the report and balance-sheet duly signed. The defendants, therefore (other than Reid), are not duly elected directors, and the only way to remedy these defects was to summon a general meeting under s. 52 of the Companies Act, 1862.

Gore-Browne, *K.C.*, and *H. E. Wright*, for the defendants. We rely on art. 108 and s. 67 of the Companies Act, 1862, which validate all acts bonâ fide done by persons believing themselves to be directors. Although Boyd became disqualified on October 25, the fact of his disqualification was not brought to the notice of the board until after March 3. On December 4 and January 5 no one doubted he was a director. Therefore the appointment of Methven was good, because the resignation of Menzies was a casual vacancy which it was competent for the directors to fill up. If so, the general meeting of March 25 was summoned by a proper board, because the irregularities

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were not then known. But if not, still the meeting was properly convened, because Reid was a director, and under arts. 1 and 88 he could summon the meeting, and did so. The irregularities were trivial and are covered by art. 108 and s. 67 of the Act: *Newhaven Local Board* v. *Newhaven School Board* (1); *Owen and Ashworth's Claim* (2); *Dawson* v. *African Consolidated Land and Trading Co.* (3) For all practical purposes a director de facto is a director de jure: Buckley on Companies, 8th ed. p. 230.

Upjohn, K.C., in reply. The irregularities were not trivial. The word "disqualified" in art. 108 relates back to arts. 85 and 89 (*d*), and means not holding the necessary number of shares. Boyd was not disqualified in that sense. He vacated his office. The words "shall afterwards be discovered" mean that the fact is afterwards discovered. Here, the facts were known to the directors at the time, although the legal result was not present to their minds.

FARWELL J. I have to determine in this case the meaning of art. 108 and s. 67 of the Companies Act, 1862; and inasmuch as the article is common form the case is of some little importance. In my opinion, the words "notwithstanding that it shall afterwards be discovered that there is some defect," and so on, do not mean, as Mr. Upjohn has contended, that the facts are afterwards discovered, but that the defect is afterwards discovered; the facts in a case like the present necessarily appear on the books of the company, as they did in *Dawson* v. *African Consolidated Land and Trading Co.* (3); the transfers there which caused the disqualification were transfers out of the name of the director whereby he lost his qualification, and those transfers appeared on the face of the company's books. It is not, therefore, that the facts are not known, but that the knowledge of the defect is not present to the mind of any person to whom it is material at the time to know it. As it is put in Buckley on the Companies Acts, 8th ed. p. 230, the object of an article like this and the

(1) (1885) 30 Ch. D. 350. (2) [1901] 1 Ch. 115, 120.
(3) [1898] 1 Ch. 6.

67th section of the general Act is to make the honest acts of de facto directors as good as the honest acts of de jure directors; and although down to the decision in *Dawson's Case* (1) the article and section were generally supposed to apply only as between members of the company and outsiders, and not as between members of the company inter se or members of the company and the company, *Dawson's Case* (1) has now decided that that view of the law is incorrect, and that the section and the article are of general operation. I think it is decidedly beneficial that it should be so, and that, although there may be some slip which has been overlooked, if it has been bonâ fide overlooked, then the acts of the de facto directors are as good as the acts of the de jure directors.

The next point is this. It is said that the discovery intended by the section and the article is of some defect in the appointment of the directors by reason of failure to hold the proper qualification shares, and that here there was no such defect. The disqualification in the present case is under art. 89 (*a*): "If he without the sanction of any general meeting accept or hold any other office under the company except that of managing director, manager, or trustee." Here Mr. Boyd accepted the office of secretary and thereby vacated his office. It has accordingly been argued that the word "disqualified" in art. 108 has a technical meaning, and that it simply means "shall cease to hold qualification shares." To my mind that is not the true meaning. I think "disqualified" refers back to art. 89, and is used in the general colloquial sense that a director becomes disqualified if he ceases to hold the requisite number of shares, or does some act or suffers something to happen which causes him to vacate his office under that article. I think "disqualified" is used in a wide sense, and that therefore the section and the article apply to the irregularities in question in this case. The result is that on January 5, which was the critical date, there was a de facto board of directors as to whom there had been no discovery that there was any defect in their appointment. Consequently I hold that the defendants are right and that they are the

(1) [1898] 1 Ch. 6.

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properly elected board of directors. The action is dismissed with costs, and there must be an order on the cross-motion striking out the name of the company as a plaintiff.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitor for defendants: *E. Ward Oliver.*

H. L. F.

FARWELL J. 1903 *May* 1, 2, 5.

OSBORNE *v.* BRADLEY.

[1903 O. 285.]

Restrictive Covenant — Object of Covenant — Building Scheme — Implied Covenants with other Purchasers—Alteration of Character of Neighbourhood—Acquiescence in Breaches.

Alteration in the character of a neighbourhood is no defence to an action on a covenant restricting user unless it is proved, by the existence of a building scheme or otherwise, that the covenant was entered into with the object either of securing the common advantage of a number of purchasers, or of protecting other property of the covenantee, and that the covenantee has, by his own acts or acquiescence, made it impossible to attain that object.

The Court will not imply mutual covenants between a number of purchasers unless the persons and the plots of land which are to be bound are in some way defined.

O. sold a plot of land to B., and took from B. a covenant, among others, that houses erected thereon should be used as private residences only. The covenants were contained in a printed form of agreement which O. used in the sale of many plots; it contained a power for the vendor to waive or vary the covenants with regard to unsold lots. There had been no sale or attempted sale by auction. No plan was produced to B. shewing what plots were affected by the restrictions. O. afterwards himself built, or allowed to be built, a number of shops on the adjoining plots, and acquiesced in some slight breaches of covenant in respect of B.'s land. The defendant, who purchased from B. and had notice of the covenant, began to alter two houses erected on the plot into shops. O. brought an action to restrain him:—

Held, that no building scheme had been proved to exist, and, in the absence of such a scheme and of proof that the covenant was entered into merely for the protection of O.'s property, the change in the character of the neighbourhood, though caused by his own acts, did not, nor did his acquiescence in minor breaches, disentitle him to an injunction.

By an indenture dated May 3, 1890, the plaintiff conveyed to one George Bavin "a piece of land in the parish of Leigh

in the county of Essex, bounded on the north side by the high road from Leigh to Southend, now called the Broadway, and on the west by Victoria Road, containing on the north side 52 feet 6 inches, and more particularly delineated on the plan thereto annexed," subject to the covenants and restrictive conditions therein contained. And the said George Bavin covenanted with the plaintiff to the intent that the burden of the covenants might run with the land (inter alia), that every house erected upon the said premises should be occupied and used for a private dwelling-house only, and no manufacture, trade, or business should be carried on thereon, nor should any operative machinery be fixed or placed thereon, and further that there should not be done in or upon the said premises any act or thing which might be or become a nuisance or annoyance to the plaintiff or to the occupiers of any neighbouring property.

Bavin built two houses on the land, and on December 23, 1891, sold and conveyed the said land and houses subject to the aforesaid covenants, and in 1897 the purchaser from Bavin sold and conveyed the land and houses to the defendant.

In October, 1902, the defendant sent in plans to the local authority for alterations turning his two houses into shops; the plaintiff heard of this, and his solicitors wrote to the defendant objecting to his proceeding with the alterations. Negotiations followed, from which it appeared that the plaintiff was quite willing to release the covenant for a money payment, but the parties could not come to an agreement. The defendant on January 20, 1903, wrote to the plaintiff that he intended to proceed with the alterations, and, receiving no answer, soon afterwards commenced and proceeded with them. On March 2, 1903, the plaintiff commenced this action for an injunction to restrain the defendant from occupying the two messuages, or permitting them to be occupied otherwise than as private houses.

The defence was that the whole character of the Broadway had been changed, and that partly by the acts of the plaintiff, who had himself built shops on both sides of the road, and that it had become so completely a business street that it was

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difficult or impossible to let houses there as private residences. It was also contended that the plaintiff had lost his right to enforce the covenant by acquiescence in breaches of it. The acts of acquiescence relied on were that the plaintiff had permitted the defendant to build, at the back of the two houses, a stable with rooms over it, which the defendant, who himself occupied a shop in the Broadway built and owned by the plaintiff, used as a warehouse and for the sale of goods, and that an auctioneer, who had occupied one of the houses as the defendant's tenant, had used it as his office without the plaintiff making any objection.

There was a good deal of dispute as to whether there was any building scheme in pursuance of which the covenants were inserted in the conveyances. It was proved that the plaintiff was at the date of the conveyance to Bavin the owner of land on both sides of the road, and had prepared two forms of agreement apparently intended for the property on the different sides of the road. In one of these agreements the property was called the Cliff Building Estate, Leigh, in the other it was called the New Town Leigh Building Estate, but they were practically in the same form and were used indifferently. They both contained a schedule of restrictive covenants which were the same as those contained in the conveyance to Bavin, but with the addition of the following clause: "The vendor reserves the right of waiving or varying any of the above conditions with regard to any of the unsold lots."

The agreements referred to a plan, but it was not clear whether any or what plan was shewn to Bavin, and it was clear that there was no plan in existence which shewed how many plots had been sold, or which plots were retained by the vendor, or as to which plots the covenants had been waived.

Bramwell Davis, *K.C.*, and *Renshaw*, for the plaintiff. There is a plain negative covenant of which the defendant had full notice, and there is no ground for saying that the plaintiff has done anything which has destroyed his right to enforce the covenant. Mere alteration in the character of the neigh-

bourhood has no effect: see Bowen L.J.'s judgment in *Sayers* v. *Collyer*. (1) The Court has no discretion in the matter: *Doherty* v. *Allman*. (2) The principle is strongly stated in the recent Irish case of *Craig* v. *Greer*. (3) There was no building scheme in this case. The doctrine of mutual covenants inferred from a building scheme only applies where there is a sale or attempted sale by auction, or the sales are made by reference to some general plan which is shewn to the purchasers and enables them to see to what plots the conditions apply. In this case there was no such plan, and the power reserved to the vendor of waiving any of the covenants with regard to unsold lots is fatal to the existence of mutual covenants.

The alleged acts of acquiescence are not sufficient to make it inequitable for the plaintiff to enforce the covenant.

Upjohn, K.C., and *MacSwinney*, for the defendant. The case is within the principle of *Renals* v. *Cowlishaw*. (4) The vendor has power to take unsold lots out of the scheme; but if he sells without exercising that power, all the purchasers are bound by the scheme and have a right to enforce it. The mutual contract may be established by any means which satisfy the Court that the covenants are intended for the benefit of the purchasers, or to enable the vendor to dispose of his property more advantageously. We admit that mere alteration of circumstances is not sufficient to release a covenantor from his contract. The true view of the principle on which the *Duke of Bedford* v. *Trustees of the British Museum* (5) was decided is explained by Bowen L.J. in *Sayers* v. *Collyer*. (6) The vendor must have by his own action or acquiescence made the common object of the covenants impossible. This Osborne has done in the present case. Acquiescence and encouragement are quite a distinct ground of relief from the existence of a building scheme. Even at common law it afforded a defence: *Davies* v. *Marshall*. (7)

(1) (1884) 28 Ch. D. 103, 108.
(2) (1878) 3 App. Cas. 709, 719.
(3) [1899] 1 I. R. 258.
(4) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.
(5) (1822) 2 My. & K. 552; 39 R. R. 288.
(6) 28 Ch. D. 108.
(7) (1861) 31 L. J. (C.P.) 61.

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The injunction the plaintiff asks for would prevent the use of the warehouse above the stables which he has permitted. He is, therefore, not entitled to an injunction, and unless he can shew that he is entitled to an injunction he cannot have damages. His only remedy depends on the equitable right created by the doctrine of notice, which is laid down in *Tulk* v. *Moxhay*. (1) See Collins L.J.'s judgment in *Rogers* v. *Hosegood* (2), referring to Sir George Jessel's judgment in *London and South Western Ry. Co.* v. *Gomm*. (3)

Renals v. *Cowlishaw* (4) and *Sidney* v. *Clarkson* (5) shew that in order to imply mutual covenants a scheme of this kind must have a common origin. Osborne's conduct here would amount to a release if any such covenants were implied: *Hepworth* v. *Pickles*. (6)

Bramwell Davis, K.C., in reply, referred to *Richards* v. *Revitt* (7) and *Nottingham Patent Brick and Tile Co.* v. *Butler*. (8)

FARWELL J. This is an action on a covenant in a deed made between the plaintiff, Mr. Osborne, and Mr. Bavin. Mr. Bradley, the defendant, was a purchaser from Bavin. The conveyance was made expressly subject to the covenants contained in the conveyance from Osborne to Bavin. It is a conveyance in fee. Negative covenants in conveyances in fee restricting the right of the purchaser to use the land purchased may for the purposes of a case like the present be considered as falling under three classes: (i.) where the covenant is entered into simply for the vendor's own benefit; (ii.) where the covenant is for the benefit of the vendor in his capacity of owner of a particular property; and (iii.) where the covenant is for the benefit of the vendor, in so far as he reserves unsold property, and also for the benefit of other purchasers, as part of what is called a building scheme. To all three classes the rule enunciated by Lord Cairns in *Doherty* v. *Allman* (9)

(1) (1848) 2 Ph. 774.
(2) [1900] 2 Ch. 388, 404.
(3) (1882) 20 Ch. D. 562, 583.
(4) 9 Ch. D. 125; 11 Ch. D. 866.
(5) (1865) 35 Beav. 118.
(6) [1900] 1 Ch. 108.
(7) (1877) 7 Ch. D. 224.
(8) (1886) 16 Q. B. D. 778.
(9) 3 App. Cas. 709, 719.

applies—that is to say, where there are negative covenants which are binding on the defendant the Court has, speaking generally, no discretion to consider the balance of convenience or matters of that nature, but is bound to give effect to the contract between the parties, unless the plaintiff seeking to enforce the covenant has by his own conduct, or by that of the persons through whom he claims, become disentitled to sue. Contractual obligations do not disappear as circumstances change, but a person who is entitled to the benefit of a covenant may, by his conduct or omission, put himself in such an altered relation to the person bound by it as makes it manifestly unjust for him to ask a Court to insist on its enforcement by injunction: *Sayers* v. *Collyer* (1), followed and adopted by the Court of Appeal in Ireland in the case of *Craig* v. *Greer*. (2) Further, it is material to consider whether the plaintiff has a right to sue at law or merely in equity. If the case is one of a common law action on a covenant, I apprehend that nothing short of such conduct as would have supported an equitable plea under the Common Law Procedure Act, or before that Act would have justified the Court of Chancery in granting an injunction restraining the action, will suffice to bar the plaintiff's right to sue on his covenant; for instances of such equitable pleas and such an injunction, see *Davies* v. *Marshall* (3) and *Williams* v. *Lord Jersey*. (4) But if the right of the covenantee is a right in equity only, different considerations may arise. At law the burden of the covenant does not run with the land, and although the covenants may perhaps be said to run with the land in equity, because the right to sue on the covenant does not arise from the notice, but by reason of the covenant which attaches to the equitable interest in the land, this does not create a privity between the parties at law. As Sir George Jessel pointed out in *London and South Western Ry. Co.* v. *Gomm* (5), it is the possession of the legal estate, without notice, by a purchaser for value, that enables him to plead an effectual legal bar to the equitable right

(1) 28 Ch. D. 103, 108.
(2) [1899] 1 I. R. 258.
(3) 31 L. J. (C.P.) 61.
(4) (1841) Cr. & Ph. 91; 54 R. R. 219.
(5) 20 Ch. D. 562, 583.

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to enforce that equitable covenant. When you have once established the absence of the legal estate, the equitable interest, as Sir George Jessel points out, remains unaffected, notice or no notice. This is to some extent material, because I think in *Sayers* v. *Collyer* (1) the Court of Appeal considered that something less than such acquiescence as would be a bar to all relief at law would enable a Court of Equity to give damages instead of an injunction. *Sayers* v. *Collyer* (1) was a case of the third class to which I have referred between two persons claiming as purchasers under a general building scheme. I think that is sufficient to shew the distinction that may arise between the various classes of cases.

In the case before me it is a question of equitable liability, and the real point for determination is whether the covenants in this case fall within the first or the third class. It cannot be successfully contended that this case comes within the second class of cases, of which, in my opinion, *Duke of Bedford* v. *Trustees of the British Museum* (2) was one. In that case, on the construction of the deed, it was apparent that the covenants were entered into for the better protection and enjoyment of Southampton House, which then belonged to the predecessor of the Duke of Bedford. When Southampton House, as a residential mansion, was taken away, it was held that the Court of Chancery would not grant an injunction; the Court left open the question whether there was any legal remedy or not—by which I apprehend they must have meant that the point was not then settled that the burden of covenants of this nature does not run with the land at law. That point, I think, was intended to be the question of law which was left open; and that bears out my view, founded on *Sayers* v. *Collyer* (1), that there is a difference in the discretion of the Courts as to remedy according as the right of a plaintiff is a legal or an equitable right. In this case I have come to the conclusion that the covenant falls under the first class, namely, that it is a covenant taken by Mr. Osborne for his own sole benefit. The circumstances are these. Mr. Osborne owned a considerable tract of land at Leigh-on-Sea, and he was desirous of

(1) 28 Ch. D. 108, 110. (2) 2 My. & K. 552; 39 R. R. 288.

selling portions on both sides of the Broadway for building lots. He had two agreements prepared which are practically identical. One or other of those agreements was shewn as a rule to purchasers, and they were told that this was the form that was always adopted. Now the agreement on the face of it refers to the plot of land by reference to a plan of the Cliff Building Estate, Leigh. There are two estates, but the agreements are practically the same, and these forms were used indiscriminately, without making any special distinction between the Cliff building estate and the other. The conditions contain various clauses, and conclude: "The vendor reserves the right of waiving or varying any of the conditions with regard to the unsold lots." As regards some purchasers, at any rate, the plan which is referred to was produced, and I should infer that practically in every case it was produced. The plan shews a number of lots, but contains nothing to shew what lots had been sold and what lots had not. If, therefore, a purchaser went to buy from Osborne, there was nothing on the face of the document or the plan to shew whether a single lot had been sold, or three or four, or almost every one; there is no evidence to shew what took place between Bavin and Osborne beyond the fact that Osborne says he shewed him those conditions. In order to arrive at the inference to be drawn from the circumstances, that a building scheme was intended by the parties, I have to find that all the purchasers intended to contract one with another, as they purchased, to abide by the various stipulations or covenants which are made applicable to the whole estate; and also, in a case like this, where the vendor retained a number of plots, that he, the vendor, intended to enter into similar covenants. It is impossible for me to draw the latter inference because of the concluding clause in the conditions. Nor would it be reasonable for me to draw the inference that a number of persons, or any one person coming in and buying intend or intends to be bound to an unknown number of unknown persons in respect of an estate which, so far as it has been sold, is undefined, and to undertake liabilities to them and to accept a corresponding benefit from them. Neither the persons, nor the estate, nor

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the lots in respect of which these covenants are entered into or undertaken are in any way stated. If it was intended that the vendor should himself be bound, he would of course have entered into the covenant himself. The whole theory of these interdependent covenants appears to me to point to an arrangement made once for all, either on a sale by auction, by conditions of sale stating the covenants and that other persons will enter into similar covenants, and a plan exhibited at the sale, or by a scheme entered into already by antecedent sales, the particulars of which are stated to the purchaser, and which are displayed upon a plan drawn upon the purchaser's deed: see *Renals* v. *Cowlishaw* (1), where James L.J. says: "To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into." To the same effect is *Spicer* v. *Martin*. (2) There Mr. Martin took his lease last of all. There were seven plots altogether conveyed in fee by the Commissioners of the Exhibition of 1851 to the superior lessor. They were all subject to restrictive covenants, and each conveyance contained a ground plan shewing all seven lots. When the lease was taken by Mr. Martin, the ground plan, containing all the seven lots, was exhibited on the lease, and Mr. Martin was told that all the other six plots had been already leased subject to similar covenants. That was held by the House of Lords to be a sufficient statement of the building scheme. It seems to me impossible to impute such an intention in the present case where the covenant itself is silent, and where no property is defined as subject to the scheme. I should have to infer that the purchaser was willing to make himself liable, not merely to the vendor (with whom he might contract to obtain a release, as was done in *Keates* v. *Lyon* (3)), but also to unknown persons indeterminate and indeterminable in number, in respect of plots of the particulars of which he knew nothing,—that he had entered blindly into a bargain of which he could not possibly know the particulars. I think it would be wrong for any Court to draw such an inference. The mere fact that the vendor has reserved to him-

(1) 11 Ch. D. 866, 868. (2) (1888) 14 App. Cas. 12.
(3) (1869) L. R. 4 Ch. 218.

self the right to vary the conditions as regards unsold property might not by itself be sufficient to prevent the existence of a scheme in respect of the plots sold before that period, if there was any evidence, such as was given in *Spicer* v. *Martin* (1), to shew that the bargain was entered into with reference to the plots so sold. On the facts before me there is nothing whatever to shew that Bavin knew whether any one single plot had been sold at all—for anything that appears he might have been the first, second, or third purchaser, or there might have been 100 sold. There were a great many lots shewn on that plan. It is inconceivable to my mind that he should have been willing to enter into a contract which, expressed in terms, would be with such persons as shall have already bought from the vendor under similar conditions and covenants, and such other persons as shall hereafter buy from him under similar conditions, the vendor being at liberty, as regards the lots that remain, to dispose of them in any way that he thinks fit. I think such a contract as that would be too far-fetched. Lord Macnaghten, in addressing the House in *Spicer* v. *Martin* (1), said that he was not disposed to extend the doctrine of *Renals* v. *Cowlishaw* (2), which first stated explicitly, as far as I remember, this implication of covenants inter se between a number of persons who had not in fact entered into such covenants. I certainly do not feel disposed, contrary to Lord Macnaghten's opinion, to attempt to extend that doctrine. The statement in Dart at p. 867 (6th edition), "The fact that the several purchasers were not aware at the date of their common purchase, of the existence of any such covenants, seems to be almost conclusive evidence of an intention that the covenants were not entered into for the benefit of the purchasers inter se, but for the advantage of the vendor himself," appears to me to be well founded. An inference that people in this position intended to enter into an indeterminate number of covenants with unknown persons seems to me to be too strong to be properly drawn.

The result is, in my opinion, that there is no scheme of any sort or description, but that the covenant is one taken by Mr. Osborne for his own benefit. Has anything happened

(1) 14 App. Cas. 12. (2) 9 Ch. D. 125.

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which prevents his asserting the right to the equitable relief to which he is entitled by virtue of that covenant? The defendant cannot be heard to complain of hardship. He had actual notice. He bought and got a conveyance at a price fixed, no doubt, by reference to the existence of these covenants; he bought two private houses, and allowed them to remain as such for a time. In 1900 he built a stable, and a warehouse over, on the piece of land at the back of the house. On the evidence I find that Mr. Osborne did not object to the building of the warehouse, and that it was built as a warehouse. Whether so built or not, Mr. Osborne never objected to its user as a warehouse; he was certainly aware that it was so used, and, if he did not go there himself, at any rate one of his daughters to his knowledge went and bought a portmanteau there. If he was asking for an injunction to restrain the defendant from using that warehouse as a warehouse, in my opinion he would fail, and, in my opinion, further, in accordance with *Sayers* v. *Collyer* (1), I should probably have dismissed his action with costs. But that is not his case. His complaint is this: "Although you did it, and I did not object, it was at the back; it faced into a side street; it is not in any way offensive, and it is merely a warehouse over a stable." As regards one of his two dwelling-houses, the one nearest the corner of Victoria Road, Mr. Osborne acquiesced in its user by a house agent, who put up a board on the window and in the corner of the garden in front. Again I say, if he was coming to restrain that particular user, probably he would not have succeeded in persuading me that he was entitled to any relief.

But the defendant is now threatening and intending and has commenced to alter structurally the front of these two houses, which were still remaining, down to his alteration, apparently dwelling-houses, by turning them into shops. I have seen the photographs, and they are shops with large fronts instead of two neat-looking residential villas. The plaintiff now comes and says, "This is a very different thing—this is not an alteration which I am at all bound to submit to in consequence of anything I have hitherto done"; and in my opinion he is right in that. I am not concerned to consider whether the

(1) 28 Ch. D. 103.

house agent could go on as a house agent or could not. That is a different matter altogether: that is not what the defendant now intends. What is now being done is to turn these two houses practically into shops and use them as shops. [His Lordship then stated the facts as to delay in issuing the writ, and stated that it was not sufficient to establish a case of laches or acquiescence.]

It is argued that inasmuch as Mr. Osborne undoubtedly allowed the use, other than as a private dwelling-house, of the part of the premises to which I have referred, he has therefore disentitled himself to object to any alteration of any sort on any part of these two lots. In my opinion that is not sound. I think the case that was referred to of *Richards* v. *Revitt* (1), before Sir Edward Fry, is an authority, if one be needed, to shew that is not so; but, to my mind, it would be contrary to common sense to say that because a man has allowed a building to be used as a warehouse in a place which would naturally perhaps be a loft over a stable on the back of a piece of land which is cut off from the front piece on which a villa residence stands, that he has disentitled himself to complain of anything done in front also. I think that would be compelling people to be extremely strict in enforcing their rights though they desired to be neighbourly. The result is that the plaintiff, in my opinion, is right. I am relieved from any necessity of considering what the exact nature of his right would be in respect of the three different classes of property, namely, the house which remains a residence, the house which was used also by a house agent, and the warehouse over the stable at the back, by reason of the fact that the plaintiff, who is entitled, in my opinion, having established his right, to an injunction in respect of the residential portion at any rate, says that he is willing to accept 125*l.* in lieu of an injunction. The plaintiff being willing to accept 125*l.* in lieu of the injunction to which he is, in my opinion, entitled, I shall give judgment for 125*l.* for the plaintiff and the costs of the action.

Solicitors: *A. R. & H. Steele; Todd, Dennes & Lamb.*

(1) 7 Ch. D. 224.

J. R. B.

SWINFEN EADY J.
1903
June 17.

In re DIXON.
DIXON *v.* CHARLESWORTH.

[1903 D. 193.]

Will—Absolute Gift—Gift over on Death "without a Will and Childless"—Repugnancy.

An executory gift over in the event of the donee of an absolute interest dying "without a will and childless" is void for repugnancy.

ORIGINATING SUMMONS.

By his will dated October 21, 1876, Robert William Dixon, after appointing his wife executrix, and his daughter Anne, his son Robert, and his niece Elizabeth trustees, and making a certain specific devise and bequest, devised and bequeathed his other real and personal estate, thereinafter called his residuary trust estate, to his trustees upon trust to pay the income to his wife for life, and on her decease to hold the residuary trust estate and the income thereof—

"In trust for all my children who shall survive me, or if deceased shall have children surviving them in equal shares, and the shares of my daughters shall be their separate estates, free from the control of any present or future husbands, and the capital and interest thereof to be inalienable otherwise than by will. And my said daughters' receipts (notwithstanding coverture) shall be effectual legal discharges for the sums represented by them.

"And if any of my children die in my lifetime leaving issue living at my death, such issue shall take equally amongst them (if more than one) the share which their respective parents would have taken if they had survived me and had attained vested interests.

"And if any of my said children die without a will and childless, my intention is that their shares shall merge in and become incorporated with the capital of my residuary trust estate for equal division amongst and between the survivors of them."

The testator gave the trustees a power of sale after the death of his wife or with her consent in writing during her lifetime, either for the purpose of more easy division amongst his children or otherwise.

The testator died on December 6, 1876, and his wife died on October 11, 1882, having made a will appointing Robert her executor.

The testator had six children—Mary, Anne, Julia, Robert, Florence, and Marjorie—all of whom survived him.

Mary, who was married and had children at the date of the will, was now a widow.

Anne and Florence were still spinsters.

Robert was married in 1887, but had no children.

Marjorie was married in 1878, and had three children. Her husband was still living.

Julia died a spinster on March 13, 1899, having made a will appointing Florence her sole executrix.

This summons was issued to determine whether any and which of the shares were now payable, or whether the gift over was capable of taking effect.

Edward Ford, for the trustees other than Robert.

William Baker, for Robert, Mary, and Florence. The shares being given absolutely, the provision that the daughters' shares shall be their separate estates and inalienable otherwise than by will cannot do more than impose a restraint on anticipation during coverture. The gift over is void for repugnancy: *Gulliver* v. *Vaux* (1); *Holmes* v. *Godson* (2); and the shares, except in the case of Marjorie, who is at present restrained from anticipation, are immediately payable.

George Henderson, for Marjorie. *Holmes* v. *Godson* (2) was merely a case of a gift over on intestacy. *Gulliver* v. *Vaux* (1) was decided in 1746, and is only reported in Burnett J.'s manuscripts. It is extremely difficult to understand from the report on what principle the additional condition "without leaving issue" was virtually ignored, and the gift over treated in effect as a gift over on intestacy.

(1) (1746) 8 D. M. & G. 167, n. (2) (1856) 8 D. M. & G. 152.

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DIXON, *In re.* DIXON *v.* CHARLESWORTH.

In the present case the gift over is on death "without a will and childless." The gift over on dying childless is valid, and is not invalidated by the additional condition of intestacy. Now "childless" like "unmarried" is ambiguous, and, applying the principle of *Heywood* v. *Heywood* (1), it means "without leaving children" in the case of Mary, who had children at the date of the will, and "without having had children" in the other cases. (2) Marjorie's share, therefore, though not payable owing to the restraint on anticipation, cannot now be divested, but the gift over may affect the shares of the other four living children. I admit that the original gift merely restrains the daughters from anticipation during coverture.

SWINFEN EADY J. On the construction of this will I am of opinion that the shares were given absolutely, the daughters' shares being subject to a restraint on anticipation during coverture. There is then a gift over in the case of any child dying "without a will and childless." Now a gift over on death "without a will," being inconsistent with the law regulating the devolution of the property in that event, is void for repugnancy: *Holmes* v. *Godson*. (3) In the present case the gift over is on death "without a will and childless." If the word "childless" stood alone, then whether it meant "without leaving" or "without having had" a child, the gift over might be valid. But as it is annexed to the repugnant condition of dying "without a will" the entire gift over is void for repugnancy. The shares of the children other than Marjorie are therefore now payable, Julia's share being payable to Florence as her executrix, while Marjorie is entitled to her share for her separate use without power of anticipation.

Solicitors: *H. S. Harris & Co., for S. H. Belk, West Hartlepool; Worthington Evans, Bird & Co., for T. Jones & Burrell, Durham.*

(1) (1860) 29 Beav. 9. (2) Sed vide *In re Booth*, [1900] 1 Ch. 768.
(3) 8 D. M. & G. 152.

G. R. A.

In re BOLTON ESTATES. RUSSELL *v.* MEYRICK.

C. A. 1903 May 1, 2, 4, 20, 21; June 23.

[1902 B. 2501.]

Act of Parliament—Construction of Statutes—Private Act of Henry VIII.—Settled Estates—Tenant in Tail—Restriction on Alienation—Prohibition—Exception in favour of Jointuring—Power—Testamentary Instrument, Execution of Power by—Application of Modern Statutes to Old Statutes.

By a private Act of 1535, 27 Hen. 8, real estates were limited to two persons respectively in tail, with cross-remainders between them in tail, with a proviso that no tenant in tail should alien any of the settled estates nor do anything to the disinheritance of his heirs, "but only for the jointure of wife."

By a later Act of 1863, which recited the earlier Act, including the proviso, the powers of the Leases and Sales of Settled Estates Act, 1856, were made applicable to the estates. Certain sections of the Act of 1863 referred to "the powers of jointuring contained in" the Act of 1535, and s. 9 enacted that "the powers in the recited Act contained or implied of giving the said lands for the jointure of a wife" should be exercisable either previously to or after a marriage.

In 1901 M. became tenant in tail in possession of the estates and he died in 1902, having by a codicil to his will purported, "in the exercise of all powers contained in" the two private Acts, "or either of them," to appoint and give the estates to his wife (who survived him) for life "by way of jointure." The question being raised whether M. had power to appoint the income of the estates for the jointure of a surviving wife:—

Held (reversing Joyce J., W. N. (1902) 214), that although a power to jointure by "will" was not actually mentioned in the Act of 1535, and in fact could not have been then contemplated inasmuch as, apart from custom, a will had no operation before the Statute of Devises, 1540, 32 Hen. 8, c. 1, yet, upon the principle stated in *Vernon's Case*, (1572) 4 Rep. 1 a, 4 a, that "an Act of late time shall be taken within the equity of an Act made long time before," a jointure under the power conferred upon a tenant in tail by the Act of 1535 could, under the present law, be well created by a testamentary instrument.

By the Broke Estates Act, 1535, a private Act of 27 Hen. 8, c. xvi., passed in order to give effect to a family arrangement between Charles (Blounte) Lord Mountjoye and Lady Anne his wife, John Poulet (or Paulet) and Elizabeth his wife—the ladies being the daughters of Robert Willoughby, Lord Broke (Sir

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Robert Willoughby, second Baron Willoughby de Broke) (1), then deceased—of the one part, and Francis Dautrey (or Dawtrey) and Blanche his wife, Foulke Gryvell (Sir Fulke Greville) and Elizabeth his wife—these two ladies being granddaughters of the said Lord Broke—of the other part, being an arrangement with reference to the landed estates of Lord Broke situate in various counties and therein described, it was enacted that the said Francis Dautrey and Blanche his wife as in her right, and the said Foulke Gryvell and Elizabeth his wife as in her right should have to them and to the heirs of their bodies as co-parceners certain portions of the said estates as therein specified, with cross-remainders as between the said Blanche Dautrey and Elizabeth Gryvell and the heirs of their respective bodies, with an ultimate remainder to the right heirs of the said Lord Broke for ever: And it was further enacted that the said Lord Mountjoye and Lady Anne his wife as in her right, and the said John Poulet and Elizabeth his wife as in her right should have to them and to the heirs of their bodies as co-parceners certain other portions of the said estates as therein specified (which last-mentioned portions are hereinafter referred to as "the Bolton estates"), with cross-remainders as between the said Anne, Lady Mountjoye and Elizabeth Poulet and the heirs of their respective bodies, with an ultimate remainder to the right heirs of the said Lord Broke for ever: And it was further enacted (by way of proviso) "that neyther the saide Charles, Lord Mountjoye and the Lady Anne his wyfe, nor any of them, nor their heires, nor the heires of any of them, shall hereafter alyen, bargayn, give, or selle any of the saide castelles, manours, meases, lands, tenementes, and other the premysses above specified, nor any parte or parcell of them, nor any other thyng doo which shulde be to the hurte or disenherytaunche of their heires, or of the

(1) The Act stated that the estates were liable "for the payment of a greate and notable dette by the said late Lord Broke at the tyme of his decease due to the Kynge's Highness." How this "dette" was incurred was not stated, but possibly it may have had some connection with the fact that Sir Robert Willoughby, the first Baron Willoughby de Broke, and the father of the second Baron named in the Act, was Lord High Steward of the Household to King Henry VII.—G. I. F. C.

heires of any of them, or to any of the saide remaynders, but only for the joynter of wyfe or wyves for terme of lyfe or lyves of any husband that hath or shall marry any of them, or any of the heires that shall be inheritable to any of the same landes and tenementes, or for terme of lyfe of any other person, or for yeres or at wyll after custome of the manour, yeldyng the true and auncyent rent of the same landes or tenementes so to him letten as is aforesaid, but that all and every other acte and actes hereafter done or suffered contrary to the true entent of the present acte shall be voyde and of none effecte in the lawe."

Eventually, by reason of the failure of the heirs of the body of Anne, Lady Mountjoye, the entirety of the Bolton estates became vested in the heirs of the body of Elizabeth Poulet, and in 1765 descended upon Harry Poulet, the sixth and last Duke of Bolton, who thereupon, by virtue of the Act, became tenant in tail thereof in possession. He died in 1794, leaving a widow Katherine, Duchess of Bolton.

By the Bolton Estates Act, 1863 (26 & 27 Vict. c. vi.), a private Act intituled "An Act for enabling agricultural leases to be granted of the estates called the Bolton Estates, entailed by an Act of the 27th year of the reign of His Majesty King Henry the 8th; and for enabling, with the sanction of the Court of Chancery, the granting of building and mining and improvement leases, and for enabling the partition and sale of the same estates": after reciting the Act of Henry VIII., including the proviso above quoted, and also the devolution of the estates under that Act, including a recital that on the death of the above-named Harry Poulet, Duke of Bolton, the Bolton estates descended upon his three co-heirs therein named who, by virtue of the provisions of the recited Act, became entitled thereto as co-parceners in tail in equal shares, "subject to the life estate of the said Katherine, Duchess of Bolton, under a settlement or deed of appointment made under the powers of jointuring contained in the recited Act as aforesaid, and which life estate determined upon her death, which took place in the year 1809," it was enacted that the provisions of the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), should apply to the present Act, subject to certain consents

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being required to the exercise of the powers of leasing and sale, also that the Court of Chancery should have powers of partition.

Sect. 4 enacted that "the consent of a person or persons claiming as a wife or husband any life estate under the powers of the recited Act or this Act shall not be required for the exercise of any of the powers of this Act," but that every lease, sale, or partition under the powers of the present Act "shall be subject and without prejudice to the estate or interest (if any) which under or by virtue of the recited Act or this Act, or the powers therein contained respectively, may be subsisting for the time being for the benefit of any such wife or husband."

Sect. 5 enacted that every lease, sale, partition, act, deed, matter, or thing to be made, done, or executed under the powers in the present Act "expressly or by reference" contained, should be good, valid, and effectual to all intents and purposes notwithstanding the (above quoted) provision or restriction of the original Broke Estates Act against alienation; but that, subject to the powers in the present Act and any estates created thereunder, the estates created by the original Act should remain in full force.

Sect. 9 was as follows: "From and after the passing of this Act the powers in the recited Act contained or implied of giving the said manors, advowsons, lands, tenements, and hereditaments hereinbefore specified for the jointure of a wife or wives, or for a term of life or lives of any husband that hath married or shall marry any of the heirs that shall be inheritable to any of the same lands and tenements shall and may be exercisable either previously to and in contemplation of a marriage, or after the completion or solemnization thereof, and may be exercised either to the whole extent of the share or part or interest of and in the manors, advowsons, lands, tenements, and hereditaments for the time being subject to the uses and limitations of the recited Act of the person or persons for the time being exercising the power, either under this Act or under the recited Act, or to the extent of a part or parts only of such share or part or interest of and in the said manors, advowsons, lands, tenements, and hereditaments."

Sect. 10 enacted that, after any partition under the present Act, "the powers of leasing, selling, and jointuring herein expressly or by reference contained" might be exercised by the several persons amongst whom the partition should be made over and in respect of the hereditaments partitioned.

On May 18, 1901, upon the death of the then Duchess of Cleveland, General Augustus William Henry Meyrick became entitled, as tenant in tail in possession, under the limitations in the Broke Estates Act, to one undivided third share of certain parts of the Bolton estates, and of certain moneys and investments representing proceeds of sale of other parts of those estates. On May 30, 1901, he made his will, by which he directed his executor and trustee to set apart out of his estate a capital sum sufficient to provide an annuity of 800*l.* for his wife during her life.

By a codicil dated the following day the testator, after reciting that direction, proceeded thus: "And whereas, in consequence of the death of the late Duchess of Cleveland, I have recently become entitled in possession to an equal third, or some other share, in the estates comprised in or dealt with by an Act of Parliament, 27 Hen. 8, c. xvi., and further dealt with by an Act of Parliament, 26 & 27 Vict. c. vi., and in the moneys representing the sale of certain parts of such estates, or in part of such estates and money; now, in exercise of all powers contained in such Acts, or either of them, and of all other powers enabling me in this behalf, I hereby appoint, bequeath, and give to my said wife, for the residue of her life, by way of jointure, the whole of my share as aforesaid in the premises to the utmost extent of my power in as general and complete a manner as possible." And he further directed and appointed that, as the annual income derived by him from the said share must considerably exceed the annuity of 800*l.* he had provided for his wife by his will, he thereby revoked the direction for that purpose given by his will, and directed that the jointure provided by his codicil for his wife should be taken in substitution for the annuity provided for her by his will.

The testator died on March 26, 1902, leaving his widow, Elizabeth Meyrick, surviving him. The question having arisen

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whether, under the above Acts, General Meyrick had power by his codicil to appoint the income of his one-third share of the Bolton estates, moneys, and investments to his widow by way of jointure, an originating summons was taken out by the parties claiming to be entitled as tenants in tail in possession to such share against Mrs. Meyrick, the widow, and against the executor of the will and codicil, to have it determined whether, upon the true construction of the two Acts, General Meyrick had power by will or codicil to appoint the income of his said share for the jointure of any wife who might survive him. It appeared that ever since the Act of 1535, whenever leases had been granted of parts of the Bolton estates, they had been granted by ordinary deeds of demise. There was no evidence of any jointure having ever been attempted to be created by testamentary instrument under the power in the Act except in the case of General Meyrick's codicil; nor by any fine or recovery, or disentailing assurance except in two instances, one being the life estate in the Act of 1863 recited to have been given to Katherine, Duchess of Bolton, who died in 1809, and the other being a jointure created in 1838, by a disentailing assurance executed on his marriage, by John William, Earl of Sandwich, a great-grandson of the above-named sixth Duke of Bolton, whereby, in exercise of his power under the original Act, he appointed the moiety to which he was then entitled as tenant in tail in possession in the Bolton estates, after the death of the survivor of himself and his mother, to the use of his wife, Mary, Countess of Sandwich, "during her life for her jointure."

In giving judgment upon the hearing of the summons (1) Joyce J. said that, having regard to the clause or proviso of restraint in the Broke Estates Act, a tenant in tail could not alienate except for the jointure of wife or wives; that what was primarily contemplated by the Act was a "legal jointure" on marriage; that the method of making a jointure by will under a power was quite modern, and that in the Act there was not a suggestion of a tenant in tail making a jointure by any mode not then available to him, there being at that time

(1) W. N. (1902) 214.

no power to devise lands by will, with a few immaterial exceptions; that after the Fines and Recoveries Act, 1833 (3 & 4 Will 4, c. 74), a tenant in tail could not jointure except by deed enrolled, and that the Wills Act, 1837 (1 Vict. c. 26), conferred no such power; that although the Bolton Estates Act, 1863, relaxed in some respects the restraint imposed by the original Act and s. 9 related to jointures, it said nothing about creating jointures or conferring any estate or interest by will; and that a defective execution of a power by will, when a deed enrolled was in strictness requisite, could not be aided by a Court of Equity. His Lordship accordingly held that General Meyrick had no power by will or codicil to appoint the income of his share for the jointure of any wife who might survive him, and made a declaration accordingly.

The defendant, Mrs. Meyrick, appealed.

The appeal was heard on May 1, 2, 4, 20, and 21, 1903.

Haldane, K.C., *Younger, K.C.*, and *G. Cave*, for the defendant, Mrs. Meyrick. It is contended that by virtue of the two private Acts, the Broke Estates Act (27 Hen. 8, c. xvi.) and the Bolton Estates Act, 1863 (26 & 27 Vict. c. vi.), a power of jointuring was created, and that it can be exercised by will. By the first Act alienation of the estates is prohibited with certain exceptions; it is permitted for the purpose of jointuring a wife and for the granting of leases. Joyce J. thought that the only mode of alienation was by a fine or a common recovery. A common recovery was not properly an alienation: it operated by way of estoppel. In *Tollet* v. *Tollet* (1) a husband had power to jointure by deed and he did it by will, and it was held that equity would make it good. In the same way a Court of Equity will aid the defective execution of a power. There being an exception from the restriction on alienation, the tenant in tail is empowered to do what he could have done at common law.

It is submitted (1.) that a power of jointuring is given to the owner, and that it may be exercised by any method by which the donee of the power could legally create a jointure at the time when the power is exercised. There is no reason for saying that the power of jointuring cannot now be exercised by

(1) (1728) 2 P. Wms. 489; 2 W. & T. 7th ed. p. 289.

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will merely because it could not so be exercised at the date of the Broke Estates Act. The Act could not have included a power of disposition by "will," for there was no power to devise lands until the Statute of Devises, 1540 (32 Hen. 8, c. 1). (2.) If any proper formalities have been omitted, a Court of Equity will aid the defective execution of the power. (3.) The power given by the Act of Henry VIII. has been modified by the Act of 1863. And (4.) if the Act of Henry VIII. is compared with the statute De Donis (13 Edw. 1, c. 1) the reasoning of Joyce J. cannot be supported.

The effect of the exception is that the person in possession of the estate for the time being for his life is to be treated for the purposes of jointuring as if he were owner in fee simple. Unrestricted ownership in fee simple is the source of the power of jointuring; it is not a power annexed to the estate of a tenant in tail. In *Read and Nashe's Case* (1), upon words in a will similar to those in this Act, it was held that there was power to make a jointure, though the power had not been properly exercised. There is nothing in the present case to distinguish General Meyrick's estate from that of a tenant for life, and therefore, upon the authority last cited, the exception in the Act may be treated as creating a power. A power to make a jointure was well exercised by a covenant to stand seised: *Wigson* v. *Garret* (2); Williams on Real Property, 19th ed. p. 237. In *Roe* v. *Grantham* (3), a case relating to the Bolton estates and raising a question upon the power of leasing contained in the proviso above quoted, it was held that a lease could not be granted by Lady Bolton "as jointress." That case was referred to by Lord Mansfield in *Earl of Darlington* v. *Pulteney* (4) in terms which have created some misapprehension, for he said that equity could no more relieve against defects in powers under family entails, as in "the case of the Duke of Bolton" (apparently referring to *Roe* v. *Grantham* (3)), than it could in defects in a common recovery. But it must now be taken as settled that equity will supply the defect in an execution of a power where there is a meritorious consideration:

(1) (1589) 1 Leon. 147.
(2) (1673) Sir T. Raym. 239.
(3) (1761) 3 Burr. 1259.
(4) (1775) 1 Cowp. 260, 267.

Mestaer v. *Gillespie* (1) ; *Tollet* v. *Tollet* (2) ; Sugden on Powers, 8th ed. pp. 563–4.

[COZENS-HARDY L.J. See also Farwell on Powers, 2nd ed. pp. 342–3.]

The true construction of the Broke Estates Act of Henry VIII. must be considered with reference to the state of the law at that time. In the statute De Donis there was an express prohibition against selling real estate, but an ordinary tenant in tail could, at the time the Broke Estates Act was passed, levy a fine or suffer a recovery. That was because fines and recoveries were held not to be alienations prohibited by the statute De Donis : *Taltarum's Case.* (3) There is nothing to shew that fines and recoveries were recognised as alienations at the date of, or that they were prohibited by, this Act.

Recoveries were originally used to avoid the Statute of Mortmain, and afterwards to get round the statute De Donis : Williams on Real Property, 14th ed. pp. 44. It could not have been intended by this clause in the Broke Estates Act that the power to jointure should be exercised by fine or recovery, for at that date a fine would have been ineffective, and a recovery would have destroyed the parliamentary entail. A fine would not bar collaterals for five years, and in order to make a jointure effective it would have to be done by a recovery, by which the tenant in tail would become entitled to an estate in fee simple : Williams on Real Property, 14th ed. p. 48. The right to suffer a recovery was the inseparable incident to an estate tail : *Mary Portington's Case.* (4) Common law powers over land were recognised at that date : 4 Cruise's Digest, 4th ed. Tit. xxxii. "Deed," cap. 13, p. 133, and 32 Hen. 8, c. 28, which conferred powers of leasing on tenants in tail.

The language used in the Broke Estates Act to create a power by exception was apt for the purpose at that time : *Read and Nashe's Case* (5) ; Farwell on Powers, 2nd ed. p. 48.

(1) (1805) 11 Ves. 621, 638; 8 R. R. 261.

(2) 2 P. Wms. 489; 2 W. & T. 7th ed. p. 289.

(3) (1472) Year Book, 12 Edw. 4, 19. [It seems that the name corrupted in the printed Year Book was really Talcarn : L. Q. R. xii. 301. —F. P.]

(4) (1614) 10 Rep. 35 b.

(5) 1 Leon. 147.

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The manner in which this private Act is referred to in subsequent transactions is important on the question of construction. The exception is always spoken of as a power: *Roe* v. *Grantham* (1); *Earl of Darlington* v. *Pulteney*. (2)

The words of the clause are not apt to describe fines or recoveries. If the clause had been intended to indicate them, it would not have referred to alienation. Therefore this clause, which is an exception, was not a power which could be exercised by fine or recovery; and the Court will take into consideration what has been done by the parties from time to time entitled under the Act, by Parliament and by the Courts. A search of the records of the counties in which the estates were situated shews that the power to jointure has not been exercised by fine or recovery, though it is true that there is no instance of an attempt to exercise it by will. A jointure might be created by will, although at the date of the Act there was no power to devise land: *Vernon's Case*. (3)

Warmington, K.C., *Hughes, K.C.*, and *T. J. C. Tomlin*, for the plaintiffs. The real question in this case is, What is the true construction of the Broke Estates Act? Under it perpetual estates tail were created, with the addition of a prohibition against alienation, suspended for specific purposes, one of which was giving a jointure to a wife. It was an absolute prohibition of the modes of assurance available at that date to tenants in tail, except so far as they could be employed to give a jointure to a wife.

At that time fines had long been known and recoveries were common forms of assurance. The language of the statute De Donis shews this. There were several statutes dealing with fines before this private Act. This Act itself refers to fines, and so does the Statute of Uses, passed in the same year, where they are spoken of in the preamble as "recoveries and other like assurances." The prohibition against alienation did not militate against the estate of the tenant in tail: *Attorney-General* v. *Duke of Marlborough*. (4) The prohibition is against any alienation which would injure the heirs; the

(1) 3 Burr. 1259.
(2) 1 Cowp. 267.
(3) 4 Rep. 1 a, 4 a.
(4) (1818) 3 Madd. 498; 18 R. R. 273.

estate could only be sold for the life of the tenant in tail. This is an exception out of a prohibition. It does not give the tenant in tail a new or additional power. An exception out of a prohibition in a statute does not itself amount to an affirmative enactment, or empower the person prohibited to do what otherwise he could not do: *Lord Advocate for Scotland* v. *Hamilton* (1); *West Derby Union* v. *Metropolitan Life Assurance Society*. (2) It is not likely that any new power would be given to jointure a wife when the Statute of Uses (27 Hen. 8, c. 10), s. 6, was being passed at that time for that very purpose. Under this private Act, in order to secure a jointure for a wife, there would have been no difficulty for a tenant in tail to suffer a common recovery: Blackstone's Commentaries, Book II. p. 271; a jointure so secured would have been good, a common recovery being then nothing more than a "common assurance": *Martin* v. *Strachan*. (3) The estates which a tenant in tail can create under this Act are strictly defined, and cannot be exceeded: *Lord Mountjoy's Case*. (4) Although at the present day the mode of assurance by a tenant in tail is not by recovery but by deed enrolled: Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 2, 41; yet, notwithstanding s. 18 of that Act, the general Act is not to override the special Act, but the two are to be read together. Sect. 18 does not take away the tenant in tail's right of disposition except where expressly mentioned: *Duke of Grafton* v. *London and Birmingham Ry. Co.* (5)

Ashworth James, for the defendant, General Meyrick's executor.

Younger, *K.C.*, in reply, referred to Co. Litt. 45 b, and *Dawkins* v. *Lord Penrhyn*. (6)

[COZENS-HARDY L.J. referred to Pigott on Recoveries, pp. 8, 10.]

Cur. adv. vult.

(1) (1852) 1 Macq. 46, 55.
(2) [1897] A. C. 647, 655.
(3) (1744) Willes, 444, 448, 452.
(4) (1589) 5 Rep. 3 b, 5 b.
(5) (1838) 6 Scott, 719; 5 Bing. N. C. 27; 50 R. R. 595.
(6) (1878) 4 App. Cas. 51.

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June 23. The judgment of the Court (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) was delivered by

COZENS-HARDY L.J. This appeal raises a question as to the construction and effect of a private Act of 27 Hen. 8 (1535) relating to (amongst other property) certain estates afterwards known as the Bolton estates.

Mrs. Meyrick, the appellant, claims to be entitled under the codicil to the will of her late husband, who was tenant in tail in possession, to the income of the estate by way of jointure. The respondents, the present tenants in tail in possession, contend that the testator had no power to create this jointure by testamentary instrument, and Joyce J. has adopted this view.

Now the Act of 1535 gave parliamentary sanction and effect to an arrangement come to between the two daughters and two grand-daughters of Lord Broke and their respective husbands. [His Lordship then stated the effect of the Act, and read the enactment or proviso above quoted. He then proceeded:—]

It was argued on behalf of the appellant that the successive takers were only tenants for life, but we are clearly of opinion that they were tenants in tail, enjoying all such rights, powers, and privileges as were possessed by tenants in tail after the statute De Donis, subject only to the proviso which has been read: *Attorney-General* v. *Duke of Marlborough*. (1) That proviso prohibits alienation or any act done or suffered to the hurt of the heirs, "but only" (inter alia) "for the joynter of wyfe or wyfes." Now, in point of form, this is not an affirmative clause enabling a jointure to be created, but an exception from a prohibition; and it is contended that the result is that the tenant in tail is left, quoad the jointure, in the same position as if the prohibition had not been inserted in the Act, and that a tenant in tail never could dispose of, nor create any interest out of, his estate tail by will; and that the only mode by which a jointure could be created was formerly by fine or recovery, and now by a disentailing assurance. On the other hand, it is contended that the Act confers a power

(1) 3 Madd. 498; 18 R. R. 273.

which may be exercised by any instrument known to the law for the time being including, since the Statute of Devises, a will.

Upon the whole, we have come to the conclusion that the former view cannot prevail. In the first place, assuming—which may be doubted—that recoveries had, in the short interval since *Taltarum's Case* (1) in 1472, come to be recognised in 1535 as common assurances and means of alienating estates tail notwithstanding the language of the statute De Donis, we are not satisfied that a jointure could have been created by means of a recovery—which was said to have a "ransacking" operation—except as part of a resettlement. In other words, the recovery must deal with and operate upon the whole fee simple, and not merely upon a smaller estate carved out of it. A resettlement would, or might, have involved the breaking of the parliamentary entail.

In the second place, even if a jointure might have been created—which we doubt—by means of a fine, such jointure would only have been good against the issue of the tenant in tail, and not against the remainders over.

In the third place, it is almost inconceivable that customary leases for life or for years at the ancient rent should have required a fine or recovery in each case, with all its delay and cost.

In the fourth place, the words are sufficient to create a power, if it is necessary to render the Act operative: *Read and Nashe's Case.* (2)

In the fifth place, there are dicta by Lord Mansfield, with reference to this very Act, in which the tenants in tail are said to have a power to lease: *Roe* v. *Grantham* (3); *Earl of Darlington* v. *Pulteney.* (4)

In the sixth place, the usage of the Bolton estates since the Act, for a period of more than three centuries, is only consistent with this view. There is no trace of leases having been granted otherwise than by ordinary deeds, and there is no trace of any jointure having been created by means of a fine or

(1) Year Book, 12 Edw. 4, 19.
(2) 1 Leon. 147.
(3) 3 Burr. 1259.
(4) 1 Cowp. 267.

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recovery or—except in one instance in 1838—by means of a disentailing assurance.

Lastly, the Bolton Estates Act, 1863, contains a recital that Katherine, Duchess of Bolton, who died in 1809, had a life estate "under a settlement or deed of appointment made under the powers of jointuring contained" in the earlier Act. Sect. 4 speaks of a wife claiming any life estate "under the powers" of the earlier Act; and similar language is used in s. 9.

It remains to consider whether, although neither fine nor recovery nor disentailing assurance is necessary to the creation of a jointure, it can be created by will. And on this point it is important to observe that, apart from custom, a will had, before 32 Hen. 8, c. 1, no operation upon land; and it is impossible to suppose that in 1535 an exercise of the power by a testamentary instrument was contemplated. We have felt the weight of this argument. But, on the authority of *Vernon's Case* (1), we think it must be held that the argument is unsound. The Statute of Uses, which was enacted in the same year as the Broke Estates Act (1535), contained provisions to the effect that a wife, for whom a jointure should be provided, should not also claim dower. It was held in *Vernon's Case* (2) that a devise of land to a wife is a jointure within the Statute of Uses: "Although land was not devisable until 32 Hen. 8, yet it is frequent in our books, that an Act made of late time shall be taken within the equity of an Act made long time before." This seems to justify the conclusion that a jointure under the power conferred by the Broke Estates Act upon tenants in tail may be well created by a testamentary instrument.

The result is that, in our opinion, the order of Joyce J. must be discharged, and it must be declared that the testator had power by will or codicil to appoint the income of the entailed estate for the jointure of the appellant, and that such power was well exercised in her favour.

Solicitors: *Ford, Lloyd & Co.; Williams & James.*

(1) 4 Rep. 1 a. (2) 4 Rep. 4 a.

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1903
May 23, 26; July 20.

[1900 W. 5411.]

Practice—Procedure—Action in Chancery Division—Whole Action referred to Official Referee—Judgment entered in pursuance of Direction of Referee—Mode of Appealing—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 19—*Judicature* (*Procedure*) *Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 5—*Rules of Supreme Court, Order* V., *r.* 9; *Order* XXXVI., *rr.* 7, (*a*), 48–55, 55*c*; *Order* XL., *rr.* 2–6; *Order* LVIII., *rr.* 1, 17.

When in an action in the Chancery Division the whole action has been referred to an official referee for trial, and judgment has been entered in pursuance of his direction, an appeal from the judgment does not lie to the Court of Appeal, but an application to set aside the judgment must be made to the judge of the Chancery Division to whom the action is assigned.

Serle v. *Fardell*, (1890) 44 Ch. D. 299, not followed.

Sect. 1, sub-s. 5, of the Judicature (Procedure) Act, 1894, applies only to appeals from inferior Courts; it does not apply to an appeal from a judgment or order of the High Court.

Daglish v. *Barton*, [1900] 1 Q. B. 284, disapproved.

Appeal from a judgment entered by the direction of an official referee to whom the whole action (brought in the Chancery Division) had been referred for trial.

This action was commenced by a writ issued in the Chancery Division on December 28, 1900, claiming damages for breach of covenants in a mining lease. The action was assigned to Farwell J. On March 4, 1901, an order was made on a summons for directions, by which the whole action was referred to one of the official referees with an assessor. The order directed that the referee "shall have all the powers of certifying and amending of a judge of the High Court of Justice, and shall direct judgment to be entered and otherwise deal with the whole action pursuant to Order XXXVI. of the Rules of the Supreme Court, 1883." On February 18, 1903, the official referee gave a certificate in the following terms: "In pursuance of the order of the Honourable Mr. Justice Farwell, dated March 4, 1901, this cause has been tried before me, and I

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hereby direct that judgment be entered for the plaintiff for the sum of 3289*l.* 6*s.* 4*d.*, including the sum of 500*l.* paid into court." The judgment was accordingly drawn up by the registrar and entered, and it bore date March 13, 1903. It was headed, "In the High Court of Justice, Chancery Division, Mr. Justice Farwell." From this judgment an appeal was brought by the defendants to the Court of Appeal. The notice of motion asked that the award of the official referee and the judgment directed to be entered thereon might be set aside and judgment entered for the defendants, or the action remitted to the official referee, on the ground that his judgment on his findings of fact was wrong in law, that his findings were wrong in law, and that there was no evidence to support the findings, or, alternatively, that the findings were against the weight of evidence and the damages were excessive.

On the opening of the appeal before Vaughan Williams, Romer, and Cozens-Hardy L.JJ. the question was raised by the Court whether an appeal lay to the Court of Appeal, or whether the application to set aside the judgment ought not to have been made to Farwell J. It was arranged that this point should be argued before the Full Court of Appeal, and it was accordingly argued before Collins M.R. and Vaughan Williams, Romer, Stirling, Mathew, and Cozens-Hardy L.JJ.

May 23, 26. *Warmington, K.C.*, *Manisty, K.C.*, and *E. Morten*, for the defendants. It is submitted that the appeal is properly brought to this Court. In *Longman* v. *East* (1) it was decided by the Court of Appeal that the Court had then no power to order an action to be referred to an official referee for trial. But by virtue of the Rules of the Supreme Court now in force, Order XXXVI., r. 7 (*a*), under which the order of March 4, 1901, was made, the Court may order any cause to be tried by an official referee; and by Order XXXVI., r. 50, an official referee has now "power to direct that judgment be entered for any or either party"; and by Order XL., r. 2, the referee to whom a cause is referred for trial "shall direct how judgment shall be entered," and then the judgment is to be entered

(1) (1877) 3 C. P. D. 142.

accordingly by a master or registrar as the case may be. The defendants' motion to set aside the judgment was made under rule 6 of Order XL. The inference from the proviso at the end of that rule, that in the King's Bench Division the motion shall be made in a Divisional Court, is that in the Chancery Division the motion is to be made in the Court of Appeal. The reason for that proviso must have been that the Legislature did not think it right that the appeal should be heard by one judge, and in the King's Bench Division there is a Divisional Court consisting of at least two judges, whereas, since s. 43 of the Judicature Act, 1873, was repealed, there is no Divisional Court in the Chancery Division. Therefore it was intended that in that Division the application should be made to the Court of Appeal. Order XXXIX., r. 1, also applies, and shews that, when there has been a trial without a jury, a motion to set aside a finding or judgment is to be made by appeal to the Court of Appeal.

[VAUGHAN WILLIAMS L.J. How is that rule consistent with the proviso to Order XL., r. 6?]

The proviso does not apply to an action in the Chancery Division.

In *Serle* v. *Fardell* (1) it was expressly decided by Kay J. that, when judgment has been actually entered up pursuant to a direction by an official referee, a motion by way of appeal to set aside the judgment must be made in the Court of Appeal.

Rule 6 of Order XL. was not then in force; but a similar rule, Order XL., r. 5, of the Rules of the Supreme Court, 1875, was then in force, though without the proviso.

In *In re Palmer* (2) it was held by Kay J. that, when an action had been referred to an official referee for trial, the official referee was to be deemed an officer of the Court, and that, notwithstanding the Arbitration Act, 1889, the Court had the right to order him to suspend proceedings. That case went to the Court of Appeal, and the matter was sent back to the official referee, who made a final order. The matter then came again before the Court of Appeal, who affirmed the order of the official referee; but on neither occasion did that Court

(1) 44 Ch. D. 299. (2) (1890) 63 L. T. 302.

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express any concluded opinion as to the proper mode of appealing from the judgment of an official referee.

[COZENS-HARDY L.J. referred to *Proudfoot* v. *Hart*. (1)]

The order of reference in the present case was expressly made under Order XXXVI. of the Rules of the Supreme Court, and the Arbitration Act has no application. Order XXXVI., r. 7 (*a*), applies to all actions in the High Court. The Court has power, not only to set aside the judgment directed by the official referee, but also to enter a different judgment: *Clark* v. *Sonnenschein*. (2) The case would come before this Court much in the same way as a motion for a new trial in an action in the King's Bench Division. The finding of fact by an official referee is equivalent to the verdict of a jury. The official referee is made a judge of law and fact in order that he may give a final judgment between the parties. Convenience is all in favour of appealing direct to the Court of Appeal, unless the appeal can be taken to a Divisional Court, and this cannot be done in the Chancery Division. The only decision really in point is *Serle* v. *Fardell* (3), and, though, of course, it does not bind this Court, it has in fact governed the practice hitherto. At any rate it shews that the defendants were not wrong in bringing the appeal to this Court. The official referee was substituted for the judge, and the judgment is entered as the judgment of the High Court, and therefore, by s. 19 of the Judicature Act, 1873, an appeal lies to the Court of Appeal, which for the purposes of the appeal can do anything which a judge of the High Court could have done. The judgment of the official referee is neither an award nor a certificate: *Munday* v. *Norton*. (4)

It has been held that the Judicature Act, 1890, which provides that motions for a new trial shall be heard by the Court of Appeal, does not apply to appeals from an official referee: *Glasbrook* v. *Owen*. (5)

Levett, K.C., and *Bryan Farrer*, for the plaintiffs. It is submitted (1.) that an appeal from the judgment of an official

(1) (1890) 25 Q. B. D. 42, 43.
(2) (1890) 25 Q. B. D. 226, 464.
(3) 44 Ch. D. 299.
(4) [1892] 1 Q. B. 403.
(5) (1890) 7 Times L. R. 62.

referee lies to a Divisional Court in an action in the Chancery Division, as well as in an action in the King's Bench Division, just as when an action is remitted for trial from the Chancery Division to a county court an appeal lies to a Divisional Court. (2.) But, if this is not so, the appeal is to the judge of the Chancery Division to whom the action is assigned. Before the Judicature Act, 1873, there was no right of appeal from a referee to the Exchequer Chamber, and it is contended that no such right was conferred by s. 18 or s. 19 of the Judicature Act, 1873. Sect. 43, which created Divisional Courts of the Chancery Division, was repealed by the Statute Law Revision Act of 1883. Sects. 56–59 of the Judicature Act, 1873, imported into the High Court the common law procedure as to arbitration, but those sections were repealed by the Arbitration Act, 1889. In *Longman* v. *East* (1) it was decided that there was no power under those sections of the Judicature Act to refer the whole of an action to an official referee for trial. But power to do this was given by the Rules of the Supreme Court, Order XXXVI., r. 7 (*a*). And s. 9 of the Judicature Act, 1884, enabled the Court with the consent of the parties to order an action to be tried by an official referee. Rule 50 of Order XXXVI. is an enabling rule.

Rule 6 of Order XL. leaves it open in what Court a motion is to be made to set aside the judgment of an official referee in an action in the Chancery Division. The judge has the same power to deal with the judgment of a referee both before and after it has been entered up. The Judicature Act, 1884, gave a statutory force to the rules.

In 1890 Kay J. decided that if judgment had not been entered on the report of the official referee the appeal lay to the judge of the High Court, but that if judgment had been entered the appeal lay to the Court of Appeal: *Serle* v. *Fardell*. (2) That decision does not bind this Court, and it is submitted that it was erroneous. When after finding the facts the official referee goes on to direct judgment to be entered, that is a merely ministerial act; there is no exercise of judicial discretion.

The judge retains seisin of the whole action. *Dyke* v.

(1) 3 C. P. D. 142. (2) 44 Ch. D. 299.

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Cannell (1), to which Kay J. referred in *Serle* v. *Fardell* (2), was not really in point, because there judgment had not been entered up. The inference drawn by Kay J. was inconsistent with the common law practice. In *In re Palmer* (3) the point was left open by the Court of Appeal. *Clark* v. *Sonnenschein* (4) shews that after the official referee has ordered judgment to be entered for the plaintiff a Divisional Court can set aside the judgment and enter judgment for the defendant.

Munday v. *Norton* (5) shews that in such a case there is a right of appeal from a Divisional Court to the Court of Appeal. That the seisin of the case by the judge continues notwithstanding the reference is shewn by *Macalpine & Co.* v. *Calder & Co.* (6)

The effect of s. 1, sub-s. 5, of the Judicature Act of 1894 is that in every case the appeal from the judgment of an official referee is to a Divisional Court in whichever Division the action is brought. An official referee is a "person" within the meaning of that sub-section: *Daglish* v. *Barton.* (7)

But, if the appeal does not in an action in the Chancery Division lie to a Divisional Court, then it is submitted that there is nothing to prevent the judge to whom the action is assigned, and who has still seisin of it, from exercising his jurisdiction after the judgment directed by the official referee has been entered. At any rate the appeal does not lie to this Court.

[VAUGHAN WILLIAMS L.J. Does not your argument come to this, that a judgment entered by the direction of an official referee, though it is in form, is not in substance a judgment of the High Court?]

A document probably written by a clerk in the office cannot properly be treated as a judgment of the High Court.

Manisty, K.C., in reply. There not being any Divisional Court in the Chancery Division, if the appeal lies to a Divisional Court it must be a Divisional Court of the King's Bench

(1) (1883) 11 Q. B. D. 180.
(2) 44 Ch. D. 299.
(3) 63 L. T. 302.
(4) 25 Q. B. D. 226, 464.
(5) [1892] 1 Q. B. 403.
(6) [1893] 1 Q. B. 545, 549.
(7) [1900] 1 Q. B. 284.

Division. It is not probable that this was intended in an action in the Chancery Division.

[VAUGHAN WILLIAMS L.J. Why should not the appeal be to the judge who directed the reference? What has taken away the power given to a judge of the Chancery Division by rule 52 of Order XXXVI. to "decide the question referred to any referee on the evidence taken before him, either with or without additional evidence"?]

That rule applies only before the conclusion of the trial. But for rule 6 of Order XL. there would not be an appeal to a Divisional Court in an action in the King's Bench Division, and the proviso in that rule does not apply to the Chancery Division.

[COZENS-HARDY L.J. Does not that rather indicate that the motion would have been in the High Court, not in the Court of Appeal?]

That would be contrary to the decision in *Serle* v. *Fardell*. (1) It is submitted that as soon as the order for reference was made the judge ceased to have anything to do with the action. It would be useless to have an action heard and decided by an official referee if it were afterwards to be heard over again by the judge. The entry of judgment is not a mere mechanical act; the official referee has to direct how judgment is to be entered. When a judge at a trial directs how judgment is to be entered, the master enters the judgment; it is not entered by the judge himself. In the same way, when an official referee directs how judgment is to be entered, he is acting precisely as a judge does. He pronounces judgment just as a judge does. But for the proviso to rule 6 of Order XL. the appeal in an action in the King's Bench Division would have been to the Court of Appeal. It is submitted that there is no provision which gives a right of appeal to the High Court.

The cases which have been cited as authorities against the appellants related to actions in the King's Bench Division; they do not apply to actions in the Chancery Division. Sect. 19 of the Judicature Act, 1873, created a new jurisdiction in the

(1) 44 Ch. D. 299.

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Court of Appeal, and nothing has since taken away that jurisdiction.

[An argument also took place with regard to the effect and operation of the Arbitration Act, 1889; but, as the judgment of the Court did not turn upon that Act, that part of the argument is omitted.]

Cur. adv. vult.

July 20. STIRLING L.J. read the judgment of the Court (Collins M.R., and Vaughan Williams, Romer, Stirling, Mathew, and Cozens-Hardy L.JJ.), in which (after stating the facts) he continued:—The notice of appeal calls in question the decision of the referee both as to the law and as to the facts. The point which has been argued before us is whether the appeal lies direct to this Court, or whether the appellants ought not in the first instance to move the High Court to set aside the judgment. Order XXXVI., r. 55c, directs that the provisions of rules 48–55 of the same order shall apply "where any cause or matter or any question or issue of fact is referred to an officer of the Court or to a special referee or arbitrator." Rules 48–55 deal with the powers of official referees; and in particular rule 50 specifically provides that, subject to any order made by the Court or judge ordering the same, "the referee shall have the same authority . . . . in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the High Court." Order XL., r. 2, provides that "every referee to whom a cause or matter shall be referred for trial shall direct how judgment shall be entered, and such judgment shall be entered accordingly by a master or registrar as the case may be." In the present case the official referee had by virtue of those orders full power to do everything which a judge of the High Court could have done in the action. The judgment which has been entered pursuant to his direction appears to be as much a judgment of the High Court as if it had been made at the trial of the action by Farwell J., whose name it bears. Sect. 19 of the Judicature Act, 1873, confers

on the Court of Appeal "jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act, and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act." In the Act of 1873 itself there does not appear to be any provision which affects the point under consideration. Of the rules the most important to be considered is Order XL., r. 6: "Where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong: Provided that in the Queen's Bench Division such motion shall be made to a Divisional Court." The first question which arises on this rule is: In what Court is such a motion to be made? Now, rules 3 and 4 of the same order confer the power of making similar motions where the trial has taken place before a judge either with or without a jury; and rule 5 provides that an application under rules 3 and 4 shall be to the Court of Appeal. There is no such direction with respect to an application under rule 6; and the inference is that the motion must be made in the High Court. This is confirmed by the concluding words of rule 6, which plainly indicate that the motion may be made in the Queen's Bench Division of that Court, and provide that in such case it shall be made to a Divisional Court. But how is the application to be made in an action in the Chancery Division, in which there is no Divisional Court? The proviso just referred to provides no more than this—that when an application under rule 6 has to be made in the Queen's Bench Division it shall be made to a Divisional Court. Applications in Chancery actions not being expressly provided for are, in our opinion, to be made in accordance with the general practice applicable to that Division. Order V., r. 9, provides that every cause or matter in the Chancery Division is to be "assigned to, and marked with the name of, one of the judges thereof," before whom (speaking generally)

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all subsequent proceedings take place. In the present case, therefore, an application under Order XL., r. 6, ought to be made before Farwell J. In terms that rule only authorizes an application to set aside the judgment and enter another on the ground that on the finding as entered the judgment as entered is wrong, and does not expressly permit the finding itself to be questioned. It has, however, been decided by the Court of Appeal that this rule is to be read along with Order XXXVI., r. 52, and that, although the operation of the latter rule might seem to be limited to cases where the referee has submitted a question to the Court, the powers conferred by it may be exercised by the Court on an application under Order XL., r. 6: *Clark* v. *Sonnenschein*. (1) In that state of things it appears to us that an application to set aside the judgment and the findings on which it is based might have been made in the Chancery Division. Order LVIII. deals with appeals to the Court of Appeal. Rule 1 provides that all such appeals shall be by way of rehearing, and shall be brought by notice of motion. Rule 17 is as follows: "Whenever under these rules an application may be made either to the Court below or to the Court of Appeal, or to a judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or judge below." Assuming, therefore, that the judgment of March 13, 1903, is a judgment of the High Court to which s. 19 of the Judicature Act, 1873, applies, and from which an appeal might be brought under Order LVIII., r. 1; still, inasmuch as the same application might be made to Farwell J. in the Chancery Division, we are of opinion that under Order LVIII., r. 17, it ought to have been made to him, and that this Court is precluded from entertaining it until he has dealt with it.

It was, however, contended that the proceedings on such an appeal as this are now regulated by the Judicature Act, 1894, s. 1, sub-s. 5: "In all cases where there is a right of appeal to the High Court from any Court or person, the appeal shall be heard and determined by a Divisional Court constituted as may be prescribed by rules of Court; and the determination thereof

(1) 25 Q. B. D. 226, 464.

by the Divisional Court shall be final, unless leave to appeal is given by that Court or by the Court of Appeal." In our opinion this clause of the Judicature Act, 1894, has reference to appeals from inferior Courts, and does not apply to an appeal from a judgment or order of the High Court itself, as the judgment in this action appears to us to be. There is, however, a decision of the Court of Appeal in *Daglish* v. *Barton* (1), which is inconsistent with this view. The Court on that occasion consisted of the late A. L. Smith L.J. and Vaughan Williams L.J., the latter of whom expressed doubt as to the true meaning of the sub-section, and now agrees with the present judgment. With the greatest respect, we are unable to agree with *Daglish* v. *Barton* (1), and think that it ought not to be followed; and it is, therefore, overruled. The present appeal to this Court must, therefore, be dismissed, without prejudice to the making of a similar application to Farwell J.; and, if necessary, the time for making such an application ought to be extended. The costs of the present appeal will follow the result of that application; and, in case none should be made, there will be liberty to apply to this Court.

Solicitors: *Tarry, Sherlock & King; Nicholl, Manisty & Co.*

(1) [1900] 1 Q. B. 284.

W. L. C.

KEKEWICH J.

1903

June 19; *July* 1.

In re FINCH AND CHEW'S CONTRACT.

[1903 F. 417.]

Will—Construction—Appointment under Special Power to Uses of existing Settlement, or such as are "capable of taking effect"—Validity of Limitation—Remoteness—Excessive Appointment.

Where under a special power of appointment a testator appoints to the uses or trusts of an antecedent instrument or such of them as are "capable of taking effect," the phrase "capable of taking effect" may be construed as meaning what the law allows to take effect, and need not be confined to a reference to the uses or trusts which, by reason of the deaths of parties and other intervening circumstances, are still in fact existing, or capable of coming into existence; and if therefore some of the uses or trusts fail by reason of the cestuis que trust not being objects of the power, or by reason of the rule against perpetuities being infringed, those uses or trusts may be treated as excluded from the appointment.

Dictum of Jessel M.R. in *Line* v. *Hall*, (1873) 43 L. J. (Ch.) 107, 108, considered and applied.

ADJOURNED SUMMONS under the Vendor and Purchaser Act, 1874.

By an indenture dated August 9, 1855, and made between Arabella Frances Armstrong of the first part, Charles Clay of the second part, and the Rev. George Gibbons and James Holbrooke Heath of the third part, being the settlement made on the marriage of Arabella F. Armstrong and Charles Clay, certain hereditaments at Hankelow and Audlem, in the county of Chester, were conveyed and assured to G. Gibbons and J. H. Heath upon certain trusts during the joint lives of Arabella F. Armstrong and Charles Clay and the life of the survivor of them, and after the death of the survivor upon such trusts in favour of their children or grandchildren as they might jointly appoint, and in default of any joint appointment by them to the use of the child or grandchild or all or such one or more of the children or grandchildren of the marriage for such estates or interests and in such form in every respect as the survivor of them, Arabella F. Armstrong and Charles Clay, should by any deed or deeds or by will or codicil appoint, and

in default of such appointment to the use of the child or children of the marriage and the heirs of his, her, or their bodies as therein mentioned.

There were issue of the marriage two children only, namely, Barbara Clay and Constance Arabella Clay.

By an indenture dated January 10, 1883, and made between Barbara Clay of the first part, the Rev. Henry Brummell Finch of the second part, and George Corser Price and the Rev. Francis Charles Finch of the third part, being the settlement made on the marriage of Barbara Clay and H. B. Finch, Barbara Clay, with the consent of H. B. Finch, conveyed to G. C. Price and F. C. Finch all her share and interest, whether vested or contingent, under the indenture of August 9, 1855, and all rights arising thereout, to hold the same to the use of Barbara Clay during her life, and after her death upon trust for H. B. Finch for life, and after his death in trust for the issue of the marriage as therein mentioned, and it was thereby declared that if there should be no child of the marriage who should attain the age of twenty-one years, then, subject to the trusts thereinbefore declared, the trustees should hold the trust property and the income thereof in trust for such persons and for such purposes as Barbara Clay should by deed or will appoint.

Charles Clay died on December 30, 1891, without having joined with Arabella F. Clay in any exercise of the joint power of appointment conferred upon them by the deed of August 9, 1855.

Under and by virtue of indentures dated June 24, 1892, and June 27, 1892, certain other hereditaments were conveyed and assured to the uses of the settlement of August 9, 1855.

Arabella F. Clay by her will dated July 11, 1896, in exercise of the power vested in her by virtue of the indenture of August 9, 1855, and of every other power in any wise enabling her, appointed certain hereditaments at Hankelow and Audlem aforesaid to the use of Barbara Finch (therein described as Barbara Clay Finch) to and for the use, ends, intents, and purposes expressed, declared, and contained in and by the settlement of January 10, 1883, "or such of them" as were

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"capable of taking effect" upon and in respect of the property thereby appointed.

Arabella F. Clay died on November 1, 1898, and her will was duly proved.

H. B. Finch died on November 8, 1899. There was never any issue of the marriage of H. B. Finch and Barbara Finch.

By a deed-poll dated December 13, 1901, Barbara Finch, in exercise of the power given to her by the will of Arabella F. Clay by reference to the marriage settlement of her, Barbara Finch, and of every or any other power enabling her in this behalf, irrevocably appointed and directed, or purported to appoint and direct, that the hereditaments appointed to her by the said will should belong to and be vested in her, Barbara Finch, her heirs, executors, and administrators, absolutely, and be forthwith conveyed and transferred accordingly.

On August 27, 1902, Barbara Finch entered into a contract for sale of the hereditaments comprised in the deed-poll of December 13, 1901, to William Lawrence Chew for 4200*l.*

In the investigation of the title to the property it was objected that the deed-poll of December 13, 1901, was inoperative, inasmuch as the power conferred on Barbara Finch by the will of Arabella F. Clay was void for remoteness, and, requisitions grounded on this objection having been made and not complied with, the present summons was taken out by the purchaser for the determination (inter alia) of the question whether the exercise by the will of Arabella F. Clay of the special power of appointment conferred upon her by the settlement of August 9, 1855, was void for remoteness, in so far as related to the general power of appointment by such exercise purporting to be conferred upon Barbara Finch.

The summons was adjourned into Court, and now came on for hearing.

Warrington, K.C., and *Stokes*, for the purchaser. The deed-poll of December 13, 1901, was executed on the assumption that a general power of appointment was given to Mrs. Finch by the will of Mrs. Clay. But that assumption was erroneous. The appointment by the will of Mrs. Clay being made by

reference to the uses of the settlement of January 10, 1883, it becomes necessary for the purpose of construction to read that settlement into the will, so as to incorporate the settlement with the will, and when that is done, inasmuch as the will is an appointment under the special power contained in the settlement of 1855, it at once becomes apparent that the general power of appointment given to Mrs. Finch, if there should be no child of her marriage who should attain the age of twenty-one, is void as infringing the rule against perpetuities. Moreover, the husband of Mrs. Finch was not an object of the special power of appointment, and therefore the life interest given to him could not take effect, but would go as in default of appointment: Farwell on Powers, 2nd ed. p. 310. The result, therefore, is that Mrs. Finch took only a life interest under the appointment; and, that being so, it is clear that she cannot make a title as vendor.

P. O. Lawrence, K.C., and *O. L. Clare*, for the vendor. The question is purely one of construction of the will of Mrs. Clay. The appointment by her is to the use, ends, intents, and purposes expressed, declared, and contained in Mrs. Finch's marriage settlement, "or such of them as are capable of taking effect," upon and in respect of the property appointed, and it is submitted that the effect of those words is that the appointment takes effect only so far as the uses and trusts of the settlement were capable of taking effect at the death of the testatrix. It follows that the life interest to the husband of Mrs. Finch, who was admittedly not an object of the power, as well as the gift to the children of the marriage, must be treated as struck out of the will of Mrs. Clay. There is no express decision on the point, but that this view of the meaning of the phrase "capable of taking effect" was taken by Sir G. Jessel is clear from the case of *Line* v. *Hall* (1), where he intimated that a gift over on a term of years becoming incapable of taking effect, took effect immediately on its being ascertained that the term was limited in favour of persons who were not objects of the power under which the term was created. Upon this view of the law the appointment by the will of Mrs. Clay

(1) 43 L. J. (Ch.) 107, 108.

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conferred upon Mrs. Finch a general power of appointment, which she has duly exercised so as to enable her to make a good title.

Warrington, K.C., in reply. The proper construction of the phrase "capable of taking effect" is capable of taking effect "by virtue of the settlement" to which reference is made, and not "by virtue of this my will."

Cur. adv. vult.

July 1. KEKEWICH J. The point on which I reserved judgment and which has now to be decided is one of construction—that is, of law as distinguished from fact; and I propose to make my narrative extremely short, so as to bring out the point in almost an abstract form. Mrs. Arabella Frances Clay had a special power of appointment exercisable by will over certain property, and, expressly purporting to exercise the power, she appointed the property "to the use of my daughter Barbara Clay Finch to and for the use, ends, intents, and purposes expressed, declared, and contained in and by the settlement made previous to and in consideration of her marriage with the Rev. Henry Brummell Finch, or such of them as are capable of taking effect upon and in respect of the property hereinbefore appointed to my said daughter Barbara Clay Finch." Reading the settlement made on the marriage of Barbara Clay Finch, which is dated January 10, 1883, into the will just mentioned so as to incorporate that settlement in the will, one finds that some of the trusts thereby declared are open to objection. I do not pause to discuss to what extent the objection is good, but assume, for the purposes of this judgment, that some of the trusts fail by reason of the cestuis que trust not being objects of the power, and others by reason of the rule against perpetuities. The abstract question is whether one may disregard these void trusts as not being capable of taking effect, and, striking them out, hold that the appointment was otherwise well exercised. In other words, is it right to construe the phrase "capable of taking effect" as meaning what the law allows to take effect, or must it be confined to a reference to the trusts which, by reason of the deaths

of parties and other intervening circumstances, are still in fact existing or capable of coming into existence? The phrase employed in old forms by reference to uses and trusts declared by an earlier document, such as "subsisting, undetermined, and capable of taking effect," seems to point to the narrower construction, and even shorter phrases, such as "subsisting and capable of taking effect," might be said to aid it; but I am not sure that the use of them would make any substantial difference, for when the uses and trusts undetermined or not still subsisting had been eliminated, one would still have had to consider the force of the remaining words, "capable of taking effect," which here stand alone. Those words have been in common use during all my experience of the profession, and during many preceding generations, and it is strange that there is no conclusive authority for their interpretation; but, with a single exception which I will presently mention, there seems to be no authority at all. The industry of counsel has supplied me with none, and, having taken the unusual step of asking one of the most eminent conveyancers of the day whether he could refer me to any book containing any statement respecting it, I have been informed that he too knows of none. The single authority on the point is *Line* v. *Hall.* (1) The judgment of Sir George Jessel M.R. in that case, stated according to the usual practice at the close of the report, deals with an entirely different point, for which the case appears to be generally cited; but in the course of the argument the learned judge disposed in a sentence of another point, which must be explained by a short reference to the facts fully stated in the report. Under the will of one G. Kilworth, E. E. Hall, the surviving husband of G. Kilworth's daughter Elizabeth, had a power of appointing certain property among the children or grandchildren of the daughter Elizabeth living at the time of her decease, at which time there were living four sons, neither of whom had then any children, so that the sons were the only objects of the power. By his will E. E. Hall purported to create a term of 1000 years to raise portions for his grandchildren, children of Elizabeth's sons, and devised the

(1) 43 L. J. (Ch.) 107.

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property in remainder to G. K. Hall, one of the sons, for life, remainder to his first and other sons successively in tail. By the will he provided that when the trusts thereinbefore declared of the term of 1000 years should have been fully performed or satisfied, or have become unnecessary or incapable of taking effect, and the trustees' costs had been discharged, the term should absolutely cease and determine. On counsel mentioning an entirely different objection to the term, the Master of the Rolls made this observation: "Here, however, the subsequent gift is to take effect immediately if the term becomes incapable of taking effect, which has happened"; and the term being thus out of the way, he construed the appointment to G. K. Hall for life, remainder to his first and other sons successively in tail, as being, on the application of the doctrine of cy-près, an estate tail in G. K. Hall. The only reason which I can find for holding the term to be out of the way was that E. E. Hall, the donee of the power of appointment, could not by any exercise of that power provide for the grandchildren who were not objects of the power, or, in other words, that the term was incapable of taking effect in law, and therefore must be struck out of the will. There was apparently no further argument on this point. It may not be satisfactory to treat so important a question as altogether and finally disposed of by an interlocutory observation of any judge, but it seems to me that here I have the clear opinion of an eminent judge, thoroughly versed in real property law, on the very point which is now submitted for my consideration, and it is to be observed that although, as already mentioned, this particular point was not argued, yet the conclusion that G. K. Hall took an estate tail in possession could not have been arrived at without getting rid of the term subject to which the appointment to him was made.

Treating that as a decision of Sir George Jessel, I might be content to follow it without expressing any opinion of my own; but, having regard to all the circumstances, I think that this would be unsatisfactory, and that the parties are entitled to know what my opinion is. First let me repeat in different language something said before. This is not an executory

trust which can be moulded by the Court to give effect to intention. What is such an executory trust is well explained and illustrated in the judgment of Chitty J. in *In re Johnston* (1), and also by another case to which I shall refer in a moment for a different purpose. There being no executory trust, the question becomes one merely of construction. Having reflected again and again on the phrase "capable of taking effect" with the aid of counsel's arguments, and such conveyancing experience of my own as could be brought to bear on it, I have come to the conclusion that there is no sound reason for limiting the phrase to what is existing or still possible in fact. It comprehends, no doubt, what is existing or remains possible in fact, but it seems to me on a literal and grammatical construction to extend also to what is allowable in law; and there is no reason why the donee of a power of appointment desiring to exercise that power by reference to another instrument, but yet so as to exclude any persons or trusts in favour of which the law will not allow him to appoint, should not do that by a comprehensive phrase instead of resorting to reference to the particular parts of the instrument which he desires to include or exclude. It may be a dangerous course, but I cannot see that it is an improper one, or that there is any objection to giving effect to it, if the language is sufficiently accurate to enable the Court to conclude what is intended.

Finding no authorities except as above on the construction of the particular phrase in question, I have cast about to see whether like phrases have been construed by decisions which could be usefully applied by analogy. The nearest analogy is that of the phrase "so far as the rules of law and equity will permit," which was fully discussed in the case of *Countess of Harrington* v. *Earl of Harrington*. (2) After careful consideration I have come to the conclusion that the construction of the phrase there under consideration does not really assist me here, and I should not have referred to it at all but that, as I understand the decision in the House of Lords, and what I may venture to term the masterly speech of Lord Cairns,

(1) (1884) 26 Ch. D. 538, 546–549. (2) (1871) L. R. 5 H. L. 87.

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the point ultimately determined was one of construction of language, treated strictly, because held not to create an executory trust.

Having decided this point of construction, I do not propose to say more than that the appointment so operates as to make good the vendor's title, and an order to that effect will be made accordingly.

Solicitors: *Chester, Broome & Griffithes, for W. C. Chew & Co., Manchester; Meredith, Roberts & Mills, for Bellyse, Audlem.*

C. C. M. D.

BYRNE J. 1903 *April* 21; *May* 27.

MALLOTT *v.* WILSON.

[1901 M. 3743.]

Voluntary Settlement—Real Estate—Grant to Trustee—Refusal to act—Disclaimer by Grantee—Revesting of Legal Estate—Validity of Settlement—Mortgage of part of Settled Property — Marshalling for Payment of Mortgage—Priority of Cestui que Trust.

By a voluntary settlement of 1866, real estate was granted unto and to the use of a trustee upon certain trusts; the settlement contained the usual covenant for further assurance, but no power of revocation by the settlor. In 1867, the trustee executed a deed of disclaimer, and the settlor also purported to put an end to the settlement:—

Held, that the settlement was not thereby rendered inoperative, but that the trust was imposed on the settlor, in whom, by operation of law, the estate had revested after the creation of the trust.

Jones v. *Jones*, W. N. (1874) 190, followed.

Statement in Preston's notes to Sheppard's Touchstone, 7th ed. p. 285, that "from the moment there is evidence of disagreement" between the grantor and grantee, "then in construction of law the grant is void ab initio, as if no grant had been made," discussed and explained.

In 1888, the settlor mortgaged part of the property comprised in the voluntary settlement; in 1899, this mortgage was paid off, and a transfer thereof taken for the benefit of the settlor's estate:—

Held, that the beneficiaries under the settlement were entitled to have the settlor's estate marshalled, and the mortgage discharged out of the unsettled portion of his assets.

SPECIAL CASE.

The subject-matter of dispute between the parties to this action was a sum of money, representing proceeds of sale of

real estate included in two voluntary settlements, executed by the same settlor in 1866 and 1889, the main question argued being the effect of a disclaimer by the sole trustee of the first voluntary settlement, the parties claiming under the second settlement contending that the effect of this disclaimer was to render the first settlement wholly inoperative; there was also a subsidiary question whether a transfer of a mortgage of 1888, which had been taken by the settlor's executors for the benefit of his estate, gave them any priority over the persons claiming under the first settlement. The documents and facts, so far as material for the purposes of this report, were as follows:—

By an indenture of voluntary settlement of July 31, 1866, between Montague Joseph Fielden, the settlor, of the one part, and William Carr of the other part, after reciting amongst other things that the settlor was entitled to certain hereditaments, furniture, railway stock, and effects, and that he was desirous of making a settlement on his wife and any child or children he might have by her, certain real estate purported to be granted unto and to the use of the said William Carr, his heirs and assigns; and it was thereby declared that the said William Carr, his heirs, executors, administrators and assigns, should stand possessed of the said hereditaments and effects, and of the said sums of stock when respectively transferred to him or them upon trusts for the settlor's wife Alice Fielden for life for her separate use without power of anticipation, and after her decease in trust for all and every the settlor's children or child by her who being sons or a son should attain twenty-one, or being daughters or a daughter should attain that age or marry, and if more than one as tenants in common, and their respective heirs, executors, administrators, and assigns for ever, and if there should be but one such child, then the whole should be in trust for that one, his or her heirs, executors, administrators, and assigns. The settlements contained the following covenant by the settlor for further assurance: "for himself, his heirs, executors, and administrators, with the said William Carr, his heirs, executors, administrators, and assigns, that the said Montague Joseph Fielden, his heirs, executors, and administrators, and every person claiming any estate or

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interest in or out of the said hereditaments and premises hereinbefore respectively granted and assigned or expressed and intended so to be or any part thereof under or in trust for him, shall and will at all times hereafter at the request of the said William Carr, his heirs, executors, administrators, or assigns, at his or their costs or at the cost of the trust hereditaments and premises, make, do, and execute all such further lawful acts, deeds, and assurances for the more perfectly granting, assigning, and confirming the said hereditaments and premises hereinbefore respectively granted and assigned or expressed and intended so to be, unto and to the use of William Carr, his heirs, executors, administrators, and assigns respectively in manner aforesaid, and for enabling him or them to obtain possession of the said furniture."

This settlement was executed by the settlor, but was never executed by William Carr.

On March 9, 1867, William Carr executed a deed-poll whereby he disclaimed the trusts of the settlement in the following terms: "The said William Carr doth hereby absolutely and irrevocably disclaim all the real and personal estate and effects whatsoever by the said indenture expressed to be granted or assigned unto or to the use of the said William Carr, his heirs, executors, administrators, or assigns, or to which he or they could or might in any manner become entitled under or by virtue of the same indenture. And also all trusts, powers, and authorities whatsoever expressed to be reposed or given in or to him or them by the said indenture."

On April 5, 1867, the settlor executed a deed-poll reciting the said settlement and that William Carr had never accepted the trusts or any of them, and that the settlor was desirous that the said intended settlement should not take or have any effect; the deed then proceeded: "Now know ye that he the said Montague Joseph Fielden doth hereby reclaim, withdraw, countermand, cancel, revoke, and make and declare imperfect, null and void, all and singular the trusts, powers, authorities, provisoes, agreements, and declarations therein respectively expressed, declared, or contained, as fully and entirely to all intents and purposes as if the said indenture had never been made or intended to be made."

By mortgage of February 11, 1888, the settlor purported to convey some of the hereditaments comprised in the settlement of 1866 to the mortgagee to secure 300*l.* and interest at 4 per cent. This deed contained the usual personal covenant by the settlor for the payment of the principal sum secured and interest.

By an indenture of voluntary settlement of January 17, 1889, between Montague Joseph Fielden, the settlor, of the one part, and Montague Leyland Fielden (the settlor's only son) and Violet Wilson of the other part, the settlor purported to convey the whole of the lands and hereditaments comprised in the settlement of 1866 with other lands (subject to the mortgage of February 11, 1888) unto the said Montague Leyland Fielden and Violet Wilson and their heirs, to the use of the settlor and his assigns for life, with remainder to the use of Montague Leyland Fielden for life, with remainder to the use of his first and other sons in tail male and in tail, with remainders over to other persons for life, with remainder to the use of such persons and for such estates as the settlor should by his will appoint, and in default to the use of the settlor, his heirs and assigns.

On October 16, 1898, Montague Joseph Fielden, the settlor, died, having made a will devising all his real and personal estate to trustees upon certain trusts.

On August 31, 1899, Alice Fielden, the testator's widow, died.

On December 5, 1899, Montague Leyland Fielden died without issue, having by his will left all his real and personal property to the plaintiff absolutely. As the only son of the settlor and Alice Fielden his wife, Montague Leyland Fielden became absolutely entitled to the hereditaments comprised in the settlement of 1866, if it still existed.

In November, 1899, a transfer of the 300*l.* mortgage of February 11, 1888, and all securities for the same, was executed in favour of the trustees and executors of the settlor for the purposes of his will and in trust for his estate, the mortgagee being paid off out of the settlor's assets.

The real estate comprised in both settlements had recently

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been sold by arrangement between all the parties interested therein, and the proceeds of sale had been paid to a joint account. The plaintiff claimed to be entitled under the settlement of 1866 to so much of the proceeds of sale as represented the hereditaments thereby settled. The defendants, who derived their title under the settlement of 1889 and the will of the settlor, claimed the whole of these proceeds of sale. The present action was therefore commenced, and a special case stated for the determination by the Court of the interests and priorities of the two sets of claimants. The first question asked by the special case was—(1.) whether the trusts declared by the 1866 settlement were (notwithstanding the deeds-poll of March 9 and April 5, 1867) still valid and binding; and, if so, (2.) whether the said mortgage of February 11, 1888, constituted a subsisting claim in favour of the settlor's executors in priority to persons claiming under the trusts of the 1866 settlement in the said purchase-moneys.

It was admitted that the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), was not applicable to the circumstances of this case.

Rowden, K.C., and *Ashton Cross*, for the plaintiff. The settlement of 1866 was a completed deed; the settlor had done everything which, according to the nature of the property, was necessary to be done in order to transfer the property and render the settlement binding upon him: *Milroy* v. *Lord* (1); the mere fact that the trustee disclaimed cannot affect the validity of the trust; the cestui que trust cannot suffer from the disclaimer of the trustee. A complete and executed deed cannot be revoked by the settlor unless a power of revocation is expressly reserved; so that the deed of disclaimer of April 5 was of no effect. On the disclaimer by the trustee the legal estate reverted to the settlor, and he became the trustee; it is immaterial that the legal estate by accident or breach of trust gets back into the hands of the settlor, as he would simply take it as a trustee: 2 White and Tudor's Leading Cases, 7th ed. p. 863, notes on *Ellison* v. *Ellison*. (2) Where a settlor

(1) (1862) 4 D. F. & J. 264, 274. (2) (1802) 6 Ves. 656; 6 R. R. 19.

purports to convey the legal estate to a trustee, and the trustee refuses to act or disclaims, that does not vitiate the deed, but the Court will appoint a new trustee: *Jones* v. *Jones* (1); Lewin on Trusts, 10th ed. p. 71. There is no difference in this case between disclaimer by deed and disclaimer by conduct: *In re Birchall.* (2) [Davidson's Precedents, 3rd ed. vol. v. Pt. II. pp. 662, 663, was also referred to.] As to the transfer of the mortgage of February 11, 1888, that cannot give the executors of the settlor any priority over the plaintiff. It is not now the case of a mortgagee claiming priority over those interested in a voluntary settlement; the mortgagee has been paid off, so that in effect it is the settlor that is setting up this mortgage as against his own settlement and his covenant for further assurance. The plaintiff is therefore entitled to have the settlor's assets marshalled, and this mortgage discharged out of the unsettled property: *Hales* v. *Cox.* (3)

Levett, K.C., and *Northcote*, for the principal defendants. By reason of the disclaimer of the trustee the settlor's intention to create a valid settlement in 1866 failed; the settlement was incomplete, and there is no equity in the Court to perfect an imperfect gift of this kind: *Milroy* v. *Lord.* (4) The effect of a disclaimer is stated in Preston's notes to Sheppard's Touchstone, 7th ed. p. 285, to be that "from the moment there is evidence of disagreement" between the grantor and grantee, "then in construction of law, the grant is void ab initio, as if no grant had been made." A deed operating, as this settlement did, by common law grant, is rendered inoperative by a subsequent disclaimer: *Peacock* v. *Eastland.* (5) The case of a conveyance operating at common law and not under the Statute of Uses was considered in *Savill Brothers, Limited* v. *Bethell.* (6) The settlement of 1866 being therefore inoperative, the settlor was in a position to execute a valid settlement in 1889; and the beneficiaries under that settlement are entitled to the proceeds of sale in priority to the plaintiff. If, as we

(1) W. N. (1874) 190.
(2) (1889) 40 Ch. D. 436.
(3) (1863) 32 Beav. 118.
(4) 4 D. F. & J. 274.
(5) (1870) L. R. 10 Eq. 17.
(6) [1902] 2 Ch. 523.

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contend, the settlement of 1866 is ineffectual, the question as to the effect of the transfer of the mortgage of February 11, 1888, becomes immaterial.

Eustace Smith, for another defendant in the same interest, adopted the above argument, and referred to *Townson* v. *Tickell* (1) as to the right of the trustee to disclaim.

Whinney, for some formal defendants, took no part in this argument.

Rowden, K.C., in reply.

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May 27. BYRNE J., after stating the material features of the documents and the facts, continued:—Now I come to the first point: What was the operation of the deed supposed to constitute the original voluntary settlement? The question appears to me to be, Was there a duly constituted trust by the first deed? I need not again read the often-quoted words of Turner L.J. in *Milroy* v. *Lord* (2), as to what is necessary to constitute a complete settlement. Of course, what is required of the settlor is that he should part with his property if he intends it to operate by way of a conveyance upon trust. And, moreover, this is an established rule, that the Court cannot construe an incomplete gift as being a declaration of trust. The operation of this first deed was that of a common law assurance, and not that of an assurance under the Statute of Uses, because it was a conveyance unto and to the use of William Carr, his heirs and assigns. I think it is quite clear that the whole legal estate passed to William Carr, and continued in him up to the time of his disclaimer.

The case of *Thompson* v. *Leach* (3), which was ultimately determined in the House of Lords, is material on this point for the reasons given in the judgment of Ventris J., which judgment is set out at length. At the original hearing three of the judges differed from Ventris J.; and on appeal, the Court of Appeal took the view of the majority of the judges in the Court below; but when the matter finally went to the House of

(1) (1819) 3 B. & Al. 31; 22 R. R. 291.

(2) 4 D. F. & J. 274.

(3) (1690) 2 Vent. 198.

Lords, as is stated at the end of the report (1): "This case was brought by writ of error into the House of Lords, and the judgment was there reversed upon the reasons in the aforesaid argument." I find from the report in Showers' Parliamentary Cases of the decision of a subsequent action that this former case had been heard in the House of Lords, as stated in this memorandum at the end of the report in Ventris. Now Mr. Preston, in his edition (7th) of Sheppard's Touchstone, says, at p. 285: "The law presumes that every grant, &c., is for the benefit of the grantee, &c.; and therefore till the contrary is shewn, supposes an agreement to the grant. From the moment there is evidence of disagreement, then in construction of law the grant is void ab initio, as if no grant had been made: and in intendment of law the freehold never passed from the grantor." And there is a passage to somewhat similar effect in Preston's Abstracts, vol. ii. p. 226: "In the first place if a grant be made by one man to another, the estate will, in intendment of law, vest immediately in the grantee; but by refusal or disagreement the grant will be void ab initio. This point was fully discussed, and received a determination in the case of *Thompson* v. *Leach*." (2) I felt somewhat embarrassed by the use of the expression "void ab initio"; but I am satisfied now that the true meaning is that, not in regard to all persons and for all purposes is the case to be treated as though the legal estate had never passed, but that as regards the trustee and the person to whom the grant was made, he is, in respect of his liabilities, his burdens, and his rights, in exactly the same position as though no conveyance had ever been made to him. And I find that in the case in Ventris the subject is expressly referred to. At p. 202 the learned judge says: "I do not cite authorities, which are plentiful enough in these matters, because they that have argued for the plaintiff have in a manner agreed, that in conveyances at the common law, generally the estate passeth to the party, till he devests it by some disagreement." I find also in *Siggers* v. *Evans* (3): "There is no doubt that a grant of goods, like any other

(1) 2 Vent. 208. (2) 2 Vent. 198.
(3) (1855) 5 E. & B. 367, 380.

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common law conveyance operating by grant, passes the property without assent. In *Butler and Baker's Case* (1) it is said: 'The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal in pais, and by that the property and interest will be devested.' The question, as to whether the property passed by a surrender subject to be devested, or whether it did not pass until assent, was discussed and settled in the important case of *Thompson* v. *Leach*." (2) Then he goes on to deal with the case of *Thompson* v. *Leach*. (2)

So in the recent case of *London and County Banking Co.* v. *London and River Plate Bank* (3), a case which did not involve this point, but in respect of which Lindley L.J. thought there was sufficient analogy to justify a reference to this class of cases, I notice he says (4): "This presumption is, I think, warranted by authority, for although the exact point has not been decided, an analogous point has. It was settled as long ago as the time of Lord Coke that the acceptance of a gift by a donee is to be presumed until his dissent is signified, even though the donee is not aware of the gift (*Butler and Baker's Case* (1)), and this doctrine has been applied even as against the Crown, and so as to defeat a title accruing to it before actual assent: *Smith* v. *Wheeler* (5), referred to at length in *Small* v. *Marwood* (6), and in *Siggers* v. *Evans*. (7) In the last-mentioned case the presumption was held to apply to a gift of an onerous nature; and in *Standing* v. *Bowring* (8) the presumption was also held to apply to a gift which the donor desired to revoke before the donee knew that it had been made. The presumption of acceptance in such cases is artificial, but is founded on human nature." Then the Lord Justice gives further reasons for it.

Under these circumstances I think that the trust was really created, and that the fact that the trustee subsequently dis-

(1) (1591) 3 Rep. 25 a.
(2) 2 Vent. 198.
(3) (1888) 21 Q. B. D. 535.
(4) 21 Q. B. D. 541.
(5) (1670) 1 Vent. 128.
(6) (1829) 9 B. & C. 300, 306; 32 R. R. 689.
(7) 5 E. & B. 380.
(8) (1885) 31 Ch. D. 282.

claimed did not destroy the trust, but that upon the revesting the settlor himself held in trust; and I arrive at this conclusion, not by construing that which was intended to be a deed operating by a transmutation of possession and the creating a third person trustee, as though it had been a declaration of trust, but by construing it as having created the trust, and the settlor as having subsequently become trustee of it by reason of the action which took place. It is really imposing the trust on the legal owner in whom by operation of law the estate is revested after the creation of the trust.

There was another case referred to—I have not mentioned it before because I have nothing but a Weekly Note of it. I therefore refer to it subject to the observation that I do not take it as being an exact reproduction of the observations of the learned judge; but *Jones* v. *Jones* (1), if it is correctly stated in the *Weekly Notes* for 1874, p. 190, appears to me to be very similar to this case in many respects. There one Jones had a general power of appointment over certain hereditaments, and appointed to Francis William Calder on certain trusts, and covenanted for further assurance. A deed was signed, sealed, and delivered by Jones, but was not communicated to or executed by Calder. Then the hereditaments subject to the power were limited to the use of Jones, his heirs and assigns for ever. In 1865 Jones made his will, not referring to the power, by which he devised his real estate upon the trusts therein contained. Then he died, and his will was proved by the plaintiff. It was not until 1872 that the existence of the deed and the trusts of it were communicated to Calder, who positively refused to undertake the trusts on account of his great age. The heir-at-law of Jones having claimed the real estate as having descended on him free from the trusts of the indenture, the plaintiff thereupon filed this bill, praying that the hereditaments in question were subject to the trusts of the deed, and for the appointment of new trustees. The Vice-Chancellor said that this settlement was valid upon the face of it, and was believed to be such by the settlor up to the time of his death, though he never com-

(1) W. N. (1874) 190.

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municated the trust to the person named as trustee. It was said, however, that in consequence of the person named in the deed declining to undertake the trusts, that the settlement was inoperative, and that the Court would not appoint a trustee. "His Honour could not take that view. The case was not within the rule as to voluntary settlements"—the expressions there are obviously very much shortened from what the judge probably used—"This view was strengthened by the covenant for further assurance. The demurrer must be overruled."

Now if that be the true view of the law, as I think it is, here there was a duly constituted settlement, and the settlor had no power or right to create a second voluntary settlement as he purported to do. I ought to pause to say that the attempt to reclaim (I refer to the document which is entitled a reclaimer and revocation by him) had no operation whatever in respect of this matter, because, if the trust was duly constituted, he had no right to revoke it, no power of revocation having been reserved in the deed itself. Then, after the lapse of years, he executes this second voluntary settlement, and it is obvious that that cannot prevail against the earlier voluntary settlement so far as it deals with the property comprised in the earlier settlement, unless—I am not quite sure that this was meant to be a part of the case raised by the special case—unless by reason of Montague Leyland Fielden, the son, having accepted the trust and executed this second voluntary settlement, is thereby estopped from saying that he or those claiming under him can take under the earlier voluntary settlement. I have considered that, and I have come to the conclusion that I cannot, on the facts as they are stated before me, find that there was any estoppel. There is not enough on the deed itself to shew it. There is no recital, and there is no grant creating an estoppel. If there were an estoppel it would be by his conduct in accepting, and the way he has dealt with it; but I have no evidence at all, and no statement shewing that he had the slightest notion even of the existence of the original voluntary settlement.

That disposes, I think, of the first point in the case. I think there was a duly constituted settlement, and that con-

sequently the money representing the property settled by the first deed still goes under that deed. But there is a second question raised, which is, whether the amount of the mortgage of February 11, 1888, ought to be thrown primarily on the unsettled estate. I think that is the way in which the second point is put. It appears to me that it ought. The case I was referred to of *Hales* v. *Cox* (1), so far as that part of the case is concerned, is, I think, an authority. In that case there was a voluntary settlement of real estate to uses in favour of four children, and a covenant that the estate was to remain to the uses of those four children, and a covenant for quiet enjoyment. The settlor afterwards mortgaged the settled estate with his own unsettled estates and died, and it was held that the children were entitled to throw the mortgages on the unsettled estate, and as against legatees to prove under the covenant against the settlor's assets for the damage they had sustained by the mortgage. As I read the case, the learned judge considered that the persons taking under the voluntary settlement as regards the subsequent mortgages only took the property subject to those mortgages, but they had a right in virtue of the doctrine of marshalling to throw as much as possible on the unsettled property, so as to liberate the settled property. I have not dealt with the second point referred to in *Hales* v. *Cox*. (1) In my opinion, the unsettled property is, therefore, primarily liable for this mortgage.

Solicitors: *Alpe & Ward; Collyer-Bristow & Co., for Shuttleworth & Dallas, Preston; Hicks, Arnold & Mozley.*

(1) 32 Beav. 118.

W. C. D.

BYRNE J.

1903

June 12, 17,

PUNT *v.* SYMONS & CO., LIMITED.

[1903 P. 1240.]

Company—Articles of Association—Alteration of Articles—Special Resolution—Contract—Retrospective Effect of Altered Articles—Issue of Shares—Bona fides—Voting Power—Injunction—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 50.

A company cannot contract itself out of its statutory right to alter its articles, even by an agreement independent of and outside the articles of association. The principle of *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656, applies to a case between the company and an outsider on a separate contract, as well as to a case between a company and a shareholder on the contract contained in the articles.

Where shares had been issued by the directors, not for the general benefit of the company, but for the purpose of controlling the holders of the greater number of shares by obtaining a majority of voting power:—

Held, applying the principle of *Fraser* v. *Whalley*, (1864) 2 H. & M. 10, that they ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used.

MOTION.

This was an application for an interim injunction to restrain the holding of a confirmatory meeting of the defendant company for the purpose of altering its articles of association, which raised a question as to the power of a company to commit a breach of contract with an outside person by the alteration of its articles, and a further question as to the power of directors to issue shares with a view to create voting power. The facts were shortly as follows:—

On October 17, 1898, the defendant company was formed for the purpose of acquiring and carrying on a furnishing business then carried on by one George Green Symons. By clause 3 of the memorandum of association the objects for which the company was established were stated to be—(*a*) to acquire and take over the business of George Green Symons, and (*b*) "To adopt and carry into effect, with or without modification, the agreement referred to in clause 3 of the company's articles of association."

The capital of the company was 11,000*l.*, divided into 11,000 shares of 1*l.* each.

The articles of association, so far as material, provided as follows:—

3. That the company should forthwith enter into an agreement with George Green Symons for the sale of the business in the terms of a draft agreement which was thereby identified.

"6. The shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons, on such terms and conditions, and at such times as the directors think fit, subject nevertheless to the stipulations contained in the said agreement with reference to the shares to be allotted in pursuance thereof."

94 provided that George Green Symons was to be the governing director with very full powers of management.

"95. The said George Green Symons, whilst he holds the office of governing director, may, from time to time and at any time, appoint any other persons to be directors of the company, and may define, limit, and restrict their powers, and may fix and determine their remuneration and duties, and may at any time remove any director howsoever appointed, and may at any time convene a general meeting of the company. Every such appointment or removal must be in writing under the hand of the person making the same."

"97. If the said George Green Symons dies whilst he hold the office of governing director, the trustees for the time being of his will, so long as 2000*l.* of the share capital stands in his name or in the names of such trustees, may exercise the powers vested in the said George Green Symons by clause 95 hereof."

With reference to proceedings at general meetings, it was provided that every question submitted to a meeting should in the first instance be decided by a show of hands; and that a poll could only be demanded by at least five members.

On October 28, 1898, the agreement for the purchase of the business referred to in clause 3 of the articles was executed. Clause 6 of this agreement provided that "The company shall not at any time alter or attempt to alter the clauses of the articles of association relating to the appointment of the

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vendor as governing director as originally framed, or do or suffer anything to be done in contravention of the provisions contained in these clauses respectively."

George Green Symons held 8300 shares out of the 9377 shares issued; and the total share holding was in the hands of seven members, four of these members holding only one share each.

In November, 1900, George Green Symons died, being at the time the governing director, and having by his will bequeathed 6300 of his shares to his executors and trustees upon certain trusts, and 2000 to another shareholder, John Jay, who already had 537 shares. The only other large shareholder was George Richard Symons, who held 536 shares. The number of members was not altered by the will.

The trustees and executors, in pursuance of the power conferred by art. 95, subsequently appointed G. R. Symons and John Jay managing directors of the company at a salary and a commission on sales. The business under their management proved unsuccessful, and very considerable friction arose between the trustees and executors and G. R. Symons, one of the managing directors, and on May 7, 1903, the directors issued eleven shares to five fresh shareholders, and called an extraordinary general meeting of the company for May 22, for the purpose of passing a special resolution altering arts. 94, 95, and 97 in such a way as to deprive the trustees and executors of all the powers and privileges originally conferred on them.

At this meeting the special resolution to alter was duly passed by means of the new shareholders, nine voting for the resolution and three against it, the trustees and executors being in the minority. Notice having been given of a confirmatory meeting, the trustees and executors thereupon commenced the present action against the company, and moved for an interim injunction to restrain the defendant company, its directors, secretary, and agents, from convening and holding an extraordinary general meeting for the purpose of confirming the special resolution passed on May 22.

The result of the evidence as to the issue of the eleven fresh shares, which was contradictory, is dealt with in the judgment.

Levett, K.C., and *J. B. Matthews*, for the plaintiffs. The resolution if carried will be a breach of the contract entered into with the testator: the alteration proposed is inconsistent with the real bargain between the parties when the company was formed. A company cannot break its contracts by altering its articles: the precise point is not covered by *Allen* v. *Gold Reefs of West Africa* (1), because here the contract is independent of and outside the articles; the plaintiffs are therefore entitled to enforce the agreement by means of an injunction restraining any alteration of these articles. Secondly, the proposed alteration is ultra vires, because one of the objects of the memorandum of association was the adoption of this agreement with the testator: one of the essential objects, therefore, for which the company was established. Thirdly, the directors cannot manipulate the issue of shares for private purposes, or merely to secure voting power. It was impossible to pass a special resolution in the original state of the two parties, except by the issue of shares to these five new members, all of them favourable to the present directors. This is a distinct breach of the fiduciary powers of directors, and will be restrained: *Fraser* v. *Whalley*. (2) The plaintiffs were not in a position to demand a poll, and unless the confirmatory meeting is stopped the minority in value will, by means of these new shares, be able to control the holders of the majority in value of the shares in this company.

Norton, K.C., and *Ward Coldridge*, for the defendant company. Assuming that a company can contract with an outsider not to alter its articles, the only effect in this case would be as if the article in question had been written into the contract; this would not prevent the company from exercising its statutory power under s. 50 of the Companies Act, 1862, though any alteration so made must be subject to the rights given to the contractor. The plaintiffs, therefore, cannot get an injunction to prevent the alteration of the articles, though they might get one to prevent the company from acting contrary to the agreement; or they might get damages for breach of the contract. A company cannot contract itself out of its statutory

(1) [1900] 1 Ch. 656. (2) 2 H. & M. 10.

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right to alter its articles: *Walker* v. *London Tramways Co.* (1); *Malleson* v. *National Insurance and Guarantee Corporation.* (2)

[BYRNE J. referred to *In re Peveril Gold Mines, Limited.* (3)]

These are cases of contract between a company and its shareholders, contained in the articles, and there appears to be no express decision on a contract between the company and an outsider, not contained in the articles; but the principle of *Allen* v. *Gold Reefs of West Africa* (4), and the observation of the Lords Justices seems to apply to the present case. [*Andrews* v. *Gas Meter Co.* (5) was also referred to.] As a question of construction, the contract relates only to arts. 94 and 95, which are personal to George Green Symons; clause 6 of the agreement came to an end by his death; there is no contract not to alter art. 97, which is the one conferring powers on the plaintiffs as executors and trustees.

The plaintiffs, as shareholders, have no right to try to prevent any alteration of the articles by injunction, or to restrain any modification in the terms of the agreement. As to the issue of further shares, the directors are clearly acting within their powers; the number of original shareholders was so small that the statutory powers could not, as a rule, be exercised; a special resolution could not be passed without creating more members by the issue of fresh shares. Shares can be transferred for voting purposes: *Pender* v. *Lushington* (6); *Moffatt* v. *Farquhar* (7); these fresh shares were issued bonâ fide for the benefit of the company. *Fraser* v. *Whalley* (8) was a case of a railway company, not a limited company, and the directors there were acting on a stale resolution; that case is distinguishable, and does not apply.

Levett, K.C., in reply. As between shareholders and the company there cannot be a contract not to alter the articles; but this case is different: the contract here is independent of the articles, and it is a contract between the company and its vendor, by which he acquired special rights against the com-

(1) (1879) 12 Ch. D. 705.
(2) [1894] 1 Ch. 200.
(3) [1898] 1 Ch. 122.
(4) [1900] 1 Ch. 656.
(5) [1897] 1 Ch. 361.
(6) (1877) 6 Ch. D. 70.
(7) (1878) 7 Ch. D. 591.
(8) 2 H. & M. 10.

pany. An issue of shares by directors for the purpose of controlling the voting power stands on a different footing from a transfer of shares by one large shareholder for the purpose of creating votes. The directors are in a fiduciary position towards the company; a large shareholder is not in the same position in this respect.

Cur. adv. vult.

June 17. BYRNE J., after referring to the incorporation of the company and the memorandum of association, and reading clause 6 of the agreement with the vendor and the material portions of the articles of association as set out above, and having stated the facts leading up to the commencement of this action, continued:—The plaintiffs sue in a double capacity: first, as trustees of the testator, with whom the company had entered into an agreement containing the stipulation to which I have referred; and, secondly, as shareholders complaining of a misuse of their powers by the directors, in issuing shares with the purpose and object of enabling a minority to control the majority. Under the testator's will some of his shares are settled, and some of the persons to whom shares have been given are persons having life interests, or limited life interests, under it, so that the plaintiffs as trustees of the will have duties to perform to all their cestuis que trust, and there is no reason for saying that they ought not to have the powers which were conferred upon them by the articles, to be exercised in the interest of their cestuis que trust.

The first point taken is that passing the resolution would be a breach of the contract which was entered into with the testator; and that the plaintiffs as executors are entitled to enforce the terms of the agreement by restraining any alteration of the articles. I think the answer to this argument is—that the company cannot contract itself out of the right to alter its articles, though it cannot, by altering its articles, commit a breach of contract. It is well established as between a company and a shareholder, the right not depending upon a special contract outside the articles, that this is the case. It has not been, so far as I know, the precise subject

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of reported decision as between a contractor and a company where the contract is independent of and outside the articles; but in the case of *Allen* v. *Gold Reefs of West Africa* (1) Lord Lindley, then Master of the Rolls, says: "The articles of a company prescribe the regulations binding on its members: Companies Act, 1862, s. 14. They have the effect of a contract (see s. 16); but the exact nature of this contract is even now very difficult to define. Be its nature what it may, the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (ss. 50 and 51); and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute: *Walker* v. *London Tramways Co.* (2) The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of s. 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bonâ fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed." Then his Lordship says (3): "Although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his

(1) [1900] 1 Ch. 656, 671. (2) 12 Ch. D. 705.
(3) [1900] 1 Ch. 673.

shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered." And Romer L.J., after dealing with the particular case, says (1): "Of course, by the above observations I have not been dealing with exceptional cases. I can imagine a case, for example, where by the memorandum of association certain provisions as to lien are made part of the constitution of the company which could not be affected by any alteration of the articles. And special contracts might be made with particular classes of shareholders or individuals, or special obligations to them might be incurred by the company, and that even by virtue of the original articles alone, which would prevent the articles being altered as against them, or prevent the alterations being enforceable against them."

Mr. Coldridge referred to an unreported case in which he had been counsel before the Court of Appeal, and Mr. Registrar Carrington has been good enough to get for me the registrar's book containing the note of what took place in the Court of Appeal. The name of the case is *In re Ladies' Dress Association, Limited, Pulbrook* v. *Ladies' Dress Association.* The question for decision was what was the effect of certain founder's certificates issued to a Mr. Pulbrook, the founder, who had rights conferred on him by the articles of association. The certificates were in these terms: "This certificate is one of the ten founder's certificates issued in pursuance of the articles of association of the company." Then it states certain rights that the holder of the certificate is to have—a commission on gross sales as provided by s. 113 of the articles, and that he "is entitled to all the further rights and subject to the provisions expressed and contained in ss. 112, 113, 114, 115, and 116 of the articles of association (copies of which several sections are indorsed hereon). And the said Association Limited for itself and its successors hereby covenants with the holder of this certificate that it will not alter or vary any or either of the above-mentioned sections of the articles of association without the written consent of the holder of the

(1) [1900] 1 Ch. 679.

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certificate. The holder is entitled to transfer the certificate." The document is given under the common seal of the company. From the registrar's note it appears the argument was: "The counsel for the appellant submitted that a company can by contract bind itself not to alter"—that means to alter articles —"as regards an outsider." Wright J. dismissed the application, whatever form it took, and the matter came before the Court of Appeal. The Master of the Rolls makes an interlocutory observation which I will pass by, and the note proceeds: "Coldridge submits he can ratify the contract." Then the Master of the Rolls: "This is no legal covenant. Let me see a contract between you and the company"; counsel submits he has a contract in the founder's certificates, or in the covenant mentioned in art. 117. The argument goes on: "The company can bind itself not to avail itself of its statutory powers." Then the note of the judgment is: "The Master of the Rolls: I think this case ought to be disposed of in a summary way. The covenant cannot be sued upon. The covenant is by the company that it should not alter any article. Order below affirmed. Appeal dismissed with costs." That appears, so far as I can judge, to be a decision upon the point now before me. Whether that be so or not, I am prepared to hold that in the circumstances of the present case the contract could not operate to prevent the article being altered under the provisions of s. 50 of the Companies Act, 1862, whatever the result of that alteration may be. It may be that the effect of an alteration after a contract is retrospective. It may be that the remedy is in damages only, or it may be that the stipulation of the contract can be enforced notwithstanding the alteration of the articles. I think that the result of the alteration depends upon the special circumstances in each case, but, speaking generally, and without saying that there may not be some exceptions, any illustration of which does not at present occur to me, I consider that the principle of the decision in *Allen* v. *Gold Reefs of West Africa* (1) applies to a case between the company and an outside party on a separate

(1) [1900] 1 Ch. 656.

contract, as well as to a case between a company and a shareholder on the contract contained in the articles, and that it applies in the present case.

The second point taken is that the memorandum binds the company to adopt and carry out the agreement, which, once adopted, cannot be modified against the wish of the contractor with the company. It is a sufficient answer that the proposed alteration is not in contravention of the contract, except in respect of a matter which has ceased to be effective. It appears to me that clause 6 of the agreement refers to those articles giving personal powers to the deceased testator, and if you read it as though clause 6 were actually inserted in the memorandum, still the stipulation being in favour of a dead person, if that were all I should not interfere to restrain the doing away with articles which have ceased to be effective. But that is not the substance of the case.

I now come to the last and most important point. It is argued on the evidence that but for the issue by the directors of the shares under their powers as directors, and, therefore, in their fiduciary character under the general power to issue shares, it would have been impossible to pass the resolution proposed; and that the shares were not issued bonâ fide, but with the sole object and intention of creating voting power to carry out the proposed alteration in the articles. On the evidence I am quite clear that these shares were not issued bonâ fide for the general advantage of the company, but that they were issued with the immediate object of controlling the holders of the greater number of shares in the company, and of obtaining the necessary statutory majority for passing a special resolution while, at the same time, not conferring upon the minority the power to demand a poll. I need not go through the affidavits. I am quite satisfied that the meaning, object, and intention of the issue of these shares was to enable the shareholders holding the smaller amount of shares to control the holders of a very considerable majority. A power of the kind exercised by the directors in this case, is one which must be exercised for the benefit of the company: primarily it is given them for the purpose of enabling them to

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raise capital when required for the purposes of the company. There may be occasions when the directors may fairly and properly issue shares in the case of a company constituted like the present for other reasons. For instance, it would not be at all an unreasonable thing to create a sufficient number of shareholders to enable statutory powers to be exercised; but when I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest, I do not think that is a fair and bonâ fide exercise of the power. One difficulty is this—that unless and until the issue of these new shares shall be set aside, these persons are the legal owners of shares in the company, and I must take care that any injunction I grant shall not in the meantime interfere with the general exercise of legal rights and powers. In *Fraser* v. *Whalley* (1) the directors of a railway company acted on an old resolution which authorized the issue of shares for a particular purpose. The particular purpose had ceased, and, the directors being afraid that at a general meeting they would be removed, were attempting to issue shares to enable them to be supported, and kept in office. Page Wood V.-C. says (2): "The directors are informed that at the next general meeting they are likely to be removed; and therefore, on the very verge of a general meeting, they, without giving notice to any one, with this indecent haste and scramble which is shewn by the times at which the meetings were held, resolve that shares are, on the faith of this obsolete power entrusted to them for a different purpose, to be issued for the very purpose of controlling the ensuing general meeting. I have no doubt that the Court will interfere to prevent so gross a breach of trust. I say nothing on the question whether the policy advocated by the directors, or that which I am told is to be pursued by Savin, is the more for the interest of the company. That is a matter wholly for the shareholders. I fully concur in the principle laid down in *Foss* v. *Harbottle* (3) as to that; but if the directors can clandestinely, and at the last moment, use a stale resolution for

(1) 2 H. & M. 10. (2) 2 H. & M. 28.
(3) (1843) 2 Hare, 461; 62 R. R. 185.

the express purpose of preventing the free action of the shareholders, this Court will take care that, when the company cannot interfere, the Court will do so." It is true that is a case relating to a railway company, and not to a company under the Joint Stock Companies Act, and it is also true that the plaintiffs were in time to prevent the issue of the shares in question; but the principle appears to me to apply. If I find as I do that shares have been issued under the general and fiduciary power of the directors for the express purpose of acquiring an unfair majority for the purpose of altering the rights of parties under the articles, I think I ought to interfere. I propose to grant an injunction, but to confine it to restraining the defendants from holding this confirmatory meeting.

Solicitors: *H. C. Barker & Son; H. Savidge.*

W. C. D.

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In re MILES.

[1903 M. 111.]

Solicitor—Costs—Bill payable by Trustees—Taxation by Beneficiaries—Incidence of Costs—Final Distribution of Estate—Prospective Costs—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 39.

Trustees having employed a solicitor in the distribution of a trust estate, certain beneficiaries obtained an order for the taxation of the solicitor's bill of costs under s. 39 of the Solicitors Act, 1843:—

Held, (1.) The costs must be taxed as between the trustees and their solicitor, and, if properly chargeable against the trustees as such, must be allowed out of the estate, irrespective of their ultimate incidence amongst the beneficiaries, which was a question outside the scope of such a taxation.

(2.) The prospective costs of completing a final distribution might properly be included in such a bill.

SUMMONS to review taxation.

The life tenant of one moiety of certain trust funds died on June 22, 1902, whereupon that moiety became divisible among three beneficiaries.

Two of the beneficiaries desired to take their shares in specie; the third wished his share realized and a mortgage thereon paid off.

The trustees, of whom one lived in London and the other was an old man of ill-health living in Wales, instructed their solicitor to take the necessary steps for winding up this moiety in accordance with the wishes of the beneficiaries, and to make all necessary apportionments of capital and income.

The solicitor did the necessary work and delivered a bill of costs to the trustees, which was not yet paid. The trustees proposed to pay it out of the estate, and to apportion the amount amongst the life tenant's executors and the respective beneficiaries according to the quantity of work involved in each case.

Two of the beneficiaries obtained an order to tax the bill under s. 39 of the Solicitors Act, 1843.

On the subsequent death of one of these beneficiaries the other took out administration to his estate.

On taxing the bill the taxing master disallowed (inter alia) costs that he thought ought to be borne by the respective beneficiaries, such as attendances on and letters to the several beneficiaries in reference to the proposed distribution, and the costs relating to the discharge of the mortgage. He allowed the costs of drawing the transfers to the beneficiaries, but disallowed the stamp duties and registration fees thereon, and the broker's fees for registering them and obtaining certificates.

In reply to the solicitor's objections, the taxing master stated that in his opinion the costs disallowed were costs incurred by and payable out of the shares of the respective beneficiaries, and not trustees' costs at all. [He referred to *In re Gray* (1) in support of this view.]

He also disallowed certain costs charged in advance for completing the final distribution, such as for attending the beneficiaries' solicitors and handing them cheques and transfers in exchange for receipts. These costs, though not actually incurred at the date of the bill, were included in order to avoid the necessity of delivering a supplementary bill. In reply to the solicitor's objections, the taxing master stated that he had no power to allow these costs.

The solicitor took out this summons to review the taxation.

Arthur J. Chitty, for the applicant. In disallowing the costs under the first head the taxing master has proceeded on a wrong principle. He ought merely to have considered whether they were necessary for the administration of the trust: *In re Brown*. (2) Their ultimate incidence is immaterial, and does not arise on this taxation, as the trustees whose bill is being taxed have a lien on the whole estate for every item of their costs properly incurred.

In re Gray (1) was the case of a third-party taxation under s. 38, to which entirely different considerations apply. Delivery of the bill to the third party is a condition precedent to taxation under that section (3), whereas in cases under s. 39 it is the

(1) [1901] 1 Ch. 239.
(2) (1867) L. R. 4 Eq. 464.
(3) Vide *In re Robertson*, (1889) 42 Ch. D. 553.

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MILES, *In re.*

trustees' bill that is taxed, and there is no delivery to the beneficiaries.

It is the common practice to allow costs charged in advance for completing the final distribution of an estate.

Ashton Cross, for the respondent. The attendances on the beneficiaries are not trustees' costs, and ought to be charged against the several beneficiaries.

[SWINFEN EADY J. The solicitor was acting for the trustees in distributing the estate. Necessary attendances on a beneficiary for this purpose would be trustees' costs. The solicitor could not charge them against a beneficiary who had not instructed him.]

At all events, the costs relating to the discharge of the mortgage ought to be borne by the incumbered share. This is the common rule in administration actions.

[SWINFEN EADY J. That is a matter to be adjusted on the distribution, not on this taxation.]

The costs apportioned to the incumbered share might more than exhaust the balance of that share, in which case the adjustment would be illusory. The taxing master has followed the usual practice.

Again, it is no doubt convenient to include prospective costs in a bill, but the taxing master has no power to allow them.

SWINFEN EADY J., after stating the facts, and holding that the trustees were entitled to consult a solicitor with regard to the distribution and to leave him to make the necessary calculations, inquiries, and adjustments, continued:—In my opinion, it is not the practice when trustees are distributing an estate among beneficiaries to have their solicitor's bill of costs dissected in the manner that has been suggested in the present case, in order that every item referring to separate shares may be extracted from it and disallowed with a view to it being ultimately charged against the shares of the respective beneficiaries. The trustees are distributing the estate, and their reasonable and proper costs incurred in so doing are properly chargeable by them against the estate as a whole.

I am further of opinion that the question whether any

particular items properly chargeable against the trustees ought ultimately to be charged against any particular beneficiary does not arise on the present summons to review the taxation, because under the Solicitors Act, 1843, s. 39, this taxation must be treated as being a taxation between the trustees and their solicitor, and if the items are properly chargeable against the trustees as such and properly payable by them to their solicitor, they must be allowed irrespective of the particular beneficiaries against whose shares they are ultimately to be charged on the final distribution. [His Lordship then dealt with certain other points, and continued :—]

Another objection related to the costs charged by anticipation. Now where there is to be a final distribution of the whole balance remaining in the hands of the trustees, and a final settlement of the whole estate, then I am of opinion that the solicitor of the trustees is entitled to include in his bill of costs by anticipation such reasonable and proper charges as will be incurred in completing the final distribution, although the final distribution is not at the moment actually completed. Where, however, there is merely an interim distribution, still leaving a further balance to be distributed, then the bill should only include the costs actually incurred up to date, leaving any further costs to be settled and adjusted on the final distribution.

With these observations, I think the better plan will be to allow the objections generally, and refer the matter back to the master to review his taxation. I have not dealt with or allowed any specific items, but I have dealt generally with the principle on which the taxation should proceed, and the taxing master can deal with the particular items.

[His Lordship and the Court of Appeal both refused leave to appeal.]

Solicitors: *J. W. T. Miles; W. A. S. Hellyar & Co.*

G. R. A.

SWINFEN EADY J.

1903

June 25.

ILFORD PARK ESTATES, LIMITED *v.* JACOBS.

[1903 I. 1136.]

Covenant—Building Restrictions—One House—Double-tenement House.

A building structurally divided into two tenements on different floors, with no internal communication, common staircase, or common front door, constitutes two houses within the meaning of a covenant not to erect more than one house on the site.

Grant v. *Langston*, [1900] A. C. 383, 399, followed.

Kimber v. *Admans*, [1900] 1 Ch. 412, distinguished.

MOTION.

By an indenture dated November 14, 1898, and made between the plaintiffs of the one part and the defendant of the other part, the plaintiffs conveyed three adjacent lots of land in Brisbane Road, Ilford, to the defendant in fee simple, subject to the stipulations in the schedule thereto which the defendant covenanted to observe.

The stipulations provided (inter alia) that—

(2.) No trade, business, or manufacture should be carried on upon any lot.

(5.) No house should be erected of less value than 300*l.*, the value to be calculated at net prime cost, exclusive of the land. Not more than one house should be erected on any lot.

(10.) No building should be erected save where the elevations had been submitted to and approved in writing by the plaintiffs' surveyor, and a copy of the design deposited with him.

The defendant proposed to erect a double-tenement house on each lot, consisting of a ground-floor tenement and a first-floor tenement above it. These tenements were quite distinct and complete in themselves, and had no communication with each other. They were entered by separate front doors set back under a common archway, and the interior staircase leading to the first-floor tenement was cut off by a 4½-inch brick wall from the ground-floor tenement. There were separate w.c.'s on the ground floor in the rear of the building, that belonging

to the first-floor tenement being entered by a staircase from the kitchen. There was no way of getting from one tenement to the other except through the front doors. The cost of each building would exceed 300*l.*, but the cost of each tenement would be less than that amount.

The plaintiffs' surveyor refused to approve the elevations on the ground that each tenement was a separate house, and, on the defendant proceeding to erect the buildings, the plaintiffs brought an action and moved for an injunction until trial to restrain her from erecting more than one house on any lot, or any house of less value than 300*l.*, or any building whereof the elevation had not been approved in writing by the plaintiffs' surveyor.

Theobald, *K.C.*, and *Fischer Williams*, for the plaintiffs. As there is no internal communication between the tenements, or any common staircase or common front door, the tenements are separate houses: *Grant* v. *Langston*. (1) There is no difference in this respect between vertical and horizontal separation: *Rogers* v. *Hosegood*. (2)

A block of flats may no doubt constitute a house: *Kimber* v. *Admans* (3), though they cannot constitute a private residence: *Rogers* v. *Hosegood* (2); but in the case of flats there is a common staircase and front door, and any particular block could be used as a house without structural alteration. This would be impossible in the present case. The Oxford English Dictionary defines a house as "A building for human habitation; *esp.* a building that is the ordinary dwelling-place of a family."

Eve, *K.C.*, *Loehnis*, and *A. M. Talbot*, for the defendant. Except as to trading, there is no restriction as to user; and the case is covered by *Kimber* v. *Admans*. (3) The absence of a common staircase is immaterial, as the ground-floor tenant would not use it in any case. In *Kimber* v. *Admans* (3) the ground-floor tenants can have had no common use of the staircase to the first floor.

(1) [1900] A. C. 383, 399. (2) [1900] 2 Ch. 388, 393.
(3) [1900] 1 Ch. 412.

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If a common front door is necessary, it can easily be put across the archway.

[SWINFEN EADY J. I must deal with the plan before me without regard to possible modifications. A common door could, however, be put to two semi-detached houses, if the separate entrances were recessed under one arch, and the common door placed in front of them.]

They would remain two houses in spite of the common front door, and in spite of any internal communication that might be made. The common staircase, common front door, and internal communication do not make two houses into one, nor does their absence make one house into two. Even if each building constitutes two houses for the purpose of inhabited house duty, as in *Grant* v. *Langston* (1), it does not follow that it constitutes two houses within the meaning of the fifth stipulation. In ordinary parlance, each building in the present case is one house contained in one set of main walls, with one foundation, and protected by one roof. The fact that the two tenements into which it is internally divided are separated by a 4½-inch partition wall does not make it two houses. The fifth stipulation has nothing to do with the mode in which the building is to be sub-divided or let, but refers to the building as a whole: *Kimber* v. *Admans*. (2) Again, the plaintiffs' surveyor has no right to consider the question of internal arrangement, as the tenth stipulation merely requires the elevations to be submitted to him for approval.

SWINFEN EADY J. stated the facts, and continued:—The plaintiffs contend that the erection of the proposed buildings is a breach of the fifth stipulation, on the ground that each building consists of two houses separated horizontally and not vertically. It is not disputed that if the defendant were to erect a building consisting of two semi-detached houses, vertically separated by a party wall, it would constitute two houses within the stipulation. But the defendant contends that each building in the present case is only one house. Now there is no internal communication between the ground-floor and first-

(1) [1900] A. C. 383, 399. (2) [1900] 1 Ch. 415.

floor tenements. There is no staircase common to the two tenements. No staircase is, in fact, required for the ground-floor tenement. There is a private staircase leading to the first-floor tenement and a separate staircase from the kitchen of that tenement to a separate w.c. on the ground-floor in the rear of the building. There is no common front door, but each tenement has a separate front door, and the only way of passing from one tenement to the other is by going out at one front door on to the small space under the archway facing the street and entering at the other front door. The language of Lord Brampton in *Grant* v. *Langston* (1) is exactly appropriate to this property. He says: "One roof covers the whole building, but each storey is so structurally composed and arranged for permanent occupation by a separate occupier that there is no internal communication of any kind between the two storeys, nor any common staircase or access to or from the street, or from any part of the outside of the premises, each having a separate entrance or entrances therefrom. In short, it would be impossible to erect two separate houses under one roof, or to divide one building into two distinct and separate houses more completely than has been accomplished in the building now under consideration."

Every word of that description is applicable to the present case, though it is true that there is a small space between the front doors and the street.

The question is whether each building constitutes one house or two houses. The defendant relied on *Kimber* v. *Admans* (2), where it was held that a block of flats constituted one house within the meaning of a covenant not to erect more than a certain number of houses on certain plots, the minimum value of each house to be 500*l*. It was contended that each flat constituted a house, but Cozens-Hardy J. said (3): "That which it is proposed to erect seems to me to be a house of the value of more than 500*l*., and none the less a house of that value because it is proposed to be used as a series of flats." His decision was affirmed by the Court of Appeal. The plaintiffs,

(1) [1900] A. C. 383, 399. (2) [1900] 1 Ch. 412.
(3) [1900] 1 Ch. 414.

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on the other hand, relied on *Rogers* v. *Hosegood* (1) as shewing that a building may be divided horizontally into several houses within the meaning of such a covenant.

Now in this case there is no question of one house being built and then used as two houses. In substance each building constitutes two houses which are structurally separate in every respect, with separate approaches to the street and no internal communication. It is quite different from a case where one building is erected containing separate flats. In that case there is internal communication between the flats by means of the common staircase. In the present case there is no internal communication whatever. It is merely a case of one house superimposed on another from which it is divided horizontally, while in the ordinary case of semi-detached houses the division is vertical.

The question whether with a slight modification of the plan each building can be converted into one block of two flats is not material. I have to consider the buildings shewn on the plan before me, and in my judgment each of them constitutes two houses. The plaintiffs are, therefore, entitled to an injunction.

[The parties agreeing to treat the motion as the trial of the action, the injunction was made perpetual.]

Solicitors: *Thorne & Welsford; G. R. Browne, Jacobs & Co.*

(1) [1900] 2 Ch. 388, 393.

G. R. A.

CORNBROOK BREWERY COMPANY, LIMITED *v.* LAW DEBENTURE CORPORATION, LIMITED.

BYRNE J.

1903

Jan. 26; *April* 6, 8.

[1902 C. 2700.]

Company—Debenture Stock—Covering Deed—Sale of Mortgaged Property—Purchase of other Property from the Company—"Charge created by the Company"—Registration—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

Debenture stock was secured by a covering deed, executed in 1897, under which the trustees had power to sell the mortgaged premises; the proceeds of sale were also to form part of the mortgaged premises, and (at the request of the company) to be invested in other property; and all property thus assured to the trustees was to be held upon the trusts of the covering deed. Part of the mortgaged premises was sold for 2700*l.*; the company bought a leasehold house, and sub-demised it to the trustees in consideration of the 2700*l.* by a deed which referred to the covering deed, and provided that the house should be held upon the trusts of that deed:—

Held, that by the sub-lease a charge was created by the company within s. 14 of the Companies Act, 1900, and that it must be registered.

THE Cornbrook Brewery Company, Limited, issued 140,000*l.* debenture stock secured by a covering deed in the usual way. This deed was dated February 17, 1897, and therefore did not require registration under the Companies Act, 1900. It was made between the company of the one part and the Law Debenture Corporation, Limited, as trustees for the debenture stockholders, of the other part. In the interpretation clause it was stated that in the deed the words "'the specifically mortgaged premises' mean the hereditaments and premises specified or referred to in the second schedule hereto, and which are to be assured to or vested in the trustees in accordance with clause 8 hereof, and any other hereditaments, assets, and premises which may become vested in the trustees in pursuance of the provisions hereinafter contained, or which ought to be so vested, and 'the mortgaged premises' means and includes the specifically mortgaged premises and the general assets collectively." The company were, by clause 8, to vest the hereditaments specified in the second schedule in the corporation. The company, as beneficial

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owner, charged the specifically mortgaged premises with payment of the stock and interest as a specific charge, and the assets and undertaking of the company, other than the specifically mortgaged premises, but including uncalled capital, were charged with payment of the stock and interest as a floating security. By clause 22 the trustees had power to sell at the request of the company any part of the mortgaged premises. By clause 23, "the trustees shall hold the proceeds to arise from any sale, letting, exchange, or other dealing with the specifically mortgaged premises under the last preceding clause, which proceeds shall become and be part of the specifically mortgaged premises upon trust at the request of the company to apply the same if they shall think fit" (sub-clause 2) "in the purchase or acquiring of any freehold, leasehold, or copyhold hereditaments, or any rights of way or other easements or rights which may seem suitable for any of the purposes of the company, and which shall be assured to and vested in the trustees," and until such application should invest the same. By clause 26, "All property assured to or vested in the trustees in pursuance of the provisions herein contained shall be held by the trustees upon and subject to the trusts, powers, and provisions hereinbefore declared and contained, and relating to the specifically mortgaged premises, and shall for all purposes be deemed to form part of the specifically mortgaged premises." The second schedule contained a list of the freehold and leasehold properties comprised in the specific charge.

The properties were duly assured to the corporation as trustees of the deed. Part of the leaseholds were afterwards sold for 2700*l.*, and the company requested the corporation to invest the proceeds in the purchase from one Margaret Carroll of a leasehold public-house called the Exile of Erin. In order to save the corporation from becoming liable to the onerous covenants of the lease the company took an assignment of the term, and granted to the corporation a sub-demise for the remainder of the term less one day.

This sub-demise was carried out by an indenture of August 18, 1902, which was expressed to be supplemental to

the trust deed. It recited (inter alia) clause 23, sub-clause 2, of the trust deed; that the corporation held certain moneys forming part of the specifically mortgaged premises; that the Exile of Erin did not form part of the specifically mortgaged premises; and that the corporation had agreed to pay 2700*l.* out of the trust funds to the company upon having it sub-demised to them upon the trusts of the covering deed; and witnessed that the company, in consideration of the 2700*l.*, as beneficial owner, demised to the corporation the Exile of Erin, to be held for the residue of the term of 1001½ years except the last day, upon the trusts of the trust deed as if originally comprised in that deed.

The corporation proposed to register the sub-demise under s. 14 of the Companies Act, 1900, and the company brought this action for a declaration that the sub-demise did not require registration.

Danckwerts, *K.C.*, and *Manning*, for the plaintiff company. The sub-demise by the company to the defendants does not require registration under s. 14 of the Companies Act, 1900. By sub-s. 1, "every mortgage or charge created by a company . . . . so far as any security on the company's property or undertaking is thereby conferred," must be registered. It is true that this sub-demise was created by the company, but it did not confer any security on the property. Under the trust deed the proceeds of sale of any of the mortgaged property remained subject to the charge; and when they were invested in the purchase of the Exile of Erin that house also became subject to the charge. That was not by virtue of the sub-demise, but under clauses 23 and 26 of the trust deed. The sub-demise was not in any sense a mortgage: it was simply a conveyance to the trustees. No question would have arisen if the sub-term had been acquired from a stranger. The charge would in that case have attached to the house when the trustees took the sub-lease, and the creator of the trust would have been the original settlor, not the lessor to the trustees. The Act of Parliament only applies to securities created by way of mortgage, and does not require that conveyances from third parties

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should be registered. The reference to the trust deed in the sub-demise makes no difference. The transaction was only a reinvestment of trust moneys, to which the Act does not apply, for when their property was acquired all that happened was that the charge under the trust deed attached to it.

This is debenture stock, and is in the same position as a series of debentures. It is, therefore, within sub-s. 4 of s. 14; and if this trust deed had been executed after the commencement of the Act we should only have had to register that deed, not subsequent charges: *In re Harrogate Estates, Limited.* (1) Sub-s. 4 was inserted because it was recognised that debenture stock or a series of debentures would not come within sub-s. 1. The charge is created when the first debenture of a series is issued: *In re Spiral Globe, Limited, No.* 2. (2) In the case of stock it is most undesirable that such conveyances should be registered, for the certificates would have to be indorsed accordingly under sub-s. 6, and would vary from time to time.

Levett, K.C., and *Kenyon Parker*, for the trustees of the deed. Sub-s. 4 of s. 14 only relieves the company from the obligations imposed by sub-s. 1, if they have complied with it by registering the first deed. In this case the covering deed was executed before the passing of the Act, and has not been registered; so sub-s. 4 has no application. The real question in dispute is whether this charge was created by the company within the meaning of sub-s. 1. If the corporation had taken this sub-demise direct from the owner, no charge would have been created by the company; but they did not do so. The sub-demise creates a charge; and the sub-term is expressed to be held on the trusts of the covering deed. Therefore it ought to be registered for the protection of the debenture stockholders.

Manning, in reply.

Cur. adv. vult.

April 8. BYRNE J. stated the facts, and continued:—The result of the transaction is that the corporation, the trustees, are not liable under the covenants contained in the lease, and

(1) [1903] 1 Ch. 498. (2) [1902] 2 Ch. 209.

the property, which prior to the execution of this deed did not form part of the specifically mortgaged property as contained in the trust deed, thenceforward formed part of that specifically mortgaged property.

It is said, and as at present advised I think truly, that had this been a direct purchase from Margaret Carroll there would have been no question about the necessity for registration of the document as a charge created by the company, because in that case there would have been no charge created by the company subsequently to the coming into operation of the Act of 1900; but that is not what I have to deal with. It appears to me that the effect of this deed conveying the term less one day to the corporation is to create "a specific mortgage or charge" upon the property thereby sub-demised, and, therefore, that it does come within the words of s. 14, sub-s. 1, and that the necessary result must follow under the other provisions contained in the Act of Parliament in the same section with reference to registration.

There is another way in which the case has been put. It is said that if this 2700*l.*, being part of the specifically mortgaged property, was invested in any property of a nature which the trustees were entitled to hold, there would then be, by virtue of the original deed, a charge upon it ipso facto. If that had been the state of affairs, and if this sub-demise had not been executed, I see no reason to doubt that the 2700*l.* might have been followed into the specific property; but it does not alter the fact, as I have said, that the deed creates a security which did not exist before it was executed. Under these circumstances, the usual order must follow, and the action must be dismissed.

Solicitors: *Hays, Schmettau & Dunn; Bircham & Co.*

H. C. R.

JOYCE J.
1903
May 4.

LONDON COUNTY COUNCIL *v.* SOUTH METROPOLITAN GAS COMPANY.

[1902 L. 2784.]

Metropolis—Gas—Testing—Interpretation of Statutes—"Daily"—Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 *Vict. c. clxxxi.*), *s.* 7.

By the South Metropolitan Gas Company's special Acts of 1869 and 1876, provision was made for the public testing of the quality of the gas supplied by them to their customers. The mode of testing and the situation and the number of the testing places, which were to be provided by the company and to be under the control of the Metropolitan Board of Works, were to be prescribed by gas referees appointed by the Board of Trade, and daily testings were to be made by gas examiners appointed by the Metropolitan Board. Similar provisions were contained in the special Acts of the other metropolitan gas companies. By an Act passed in 1880, which was applicable to all the metropolitan gas companies, the provisions as to daily testings were substantially re-enacted by a section which provided that a gas examiner should at each testing place make daily such number of testings as the gas referees should prescribe.

There was also a provision in the special Act of 1869, which was to be read with the Act of 1880, defining "day" as twenty-four hours, beginning at 9 o'clock in the forenoon of one day and ending at 9 o'clock in the forenoon of the next. The practice under these Acts until 1902 had been to test on week-days only:—

Held, that the literal meaning of "daily" in the Act of 1880, read with the Act of 1869, with reference to the South Metropolitan Gas Company was "every day," including Sundays, taking the day as commencing at 9 o'clock in the forenoon, and that the practice prevailing under similar provisions in previous Acts of Parliament from 1869 to 1880 was not sufficient to justify the Court in construing the Act of 1880 with reference to that practice, in accordance with the principle suggested by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, 591:

Held, therefore, that the gas examiners appointed by the London County Council as the successors of the Metropolitan Board were entitled to test on Sundays the gas supplied by the company.

THE plaintiffs, by several statutes hereinafter referred to, were under the obligation of testing in the interests of the public the quality of the gas supplied by the defendants and the other metropolitan gas companies to their respective customers.

This action was brought for a declaration that the duly

appointed gas examiners of the plaintiffs were entitled to make daily (including Sunday) tests of the gas supplied by the defendants, and for an injunction to restrain the defendants from preventing such gas examiners from making tests on Sundays.

By the defendants' special Act of 1869, intituled the South Metroplitan Gaslight and Coke Company's Act, 1869 (32 & 33 Vict. c. cxxx.), s. 3, the term "day" (subject to an exception not material to the present case) was defined as meaning "twenty-four hours reckoned from nine o'clock in the forenoon of one day to nine o'clock in the forenoon of the next following day, so much of each day as is before nine o'clock in the forenoon being reckoned as part of the immediately preceding day of the month or week."

This Act provided for the appointment by the Board of Trade of certain officials called gas referees, who were to prescribe the mode and times for testing the illuminating power and purity of the gas supplied by the company, and were also to prescribe what testing places and apparatus should be provided by the company, and such testing places and apparatus were to be under the control and management of the Metropolitan Board of Works. The Act further provided for the appointment by the Metropolitan Board of gas examiners, whose duty it was at each testing place to test daily the illuminating power and purity of the gas.

By the South Metropolitan Gaslight and Coke Company's Act, 1876 (39 & 40 Vict. c. ccxxix.), the provisions of the Act of 1869 as to testing and as to the appointment of gas examiners were repealed and re-enacted with modifications. By this Act it was provided that the gas referees should from time to time prescribe the situation and number of the testing places and the apparatus therein for testing the quality of the gas to be provided by the company, and that the company should provide and maintain such testing places and apparatus, and that the testing places and apparatus should be under the control of the Metropolitan Board; and the Act also provided for the appointment by the Metroplitan Board of gas examiners for the several testing places within their jurisdiction. The

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Act also provided for daily testings by the examiners. Between 1868 and 1876 similar provisions were enacted with respect to the other metropolitan gas companies. In 1879 the defendants changed their name from the South Metropolitan Gaslight and Coke Company to the South Metropolitan Gas Company. By the Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), it was provided (s. 4) that the Act should apply to the metropolitan gas companies therein enumerated (including the defendants) and throughout the districts of the said companies, and that for the purpose of its application throughout any one of such districts the expression "the company" should be construed to mean such one of the said companies as was for the time being authorized to supply gas in such district, and that the expressions "gas referees" and "gas examiner" should respectively have the meanings assigned to them in the special Act of such company, and that the special Act of such company as amended by the Act now in statement and the latter Act should be construed together as one Act. Sect. 7 provided as follows: "A gas examiner shall at each testing place make daily such number of tests as the gas referees may prescribe for ascertaining whether during the whole of each day the illuminating power and purity of the gas supplied at such testing place by the company are such as are respectively prescribed under the special Act: Provided that the tests for illuminating power shall be taken at intervals of not less than one hour."

The plaintiffs, as the successors of the Metropolitan Board, duly appointed gas examiners for the several testing places of the defendants prescribed by the gas referees. One of these examiners, by the direction of the plaintiffs, attended at each of the defendants' testing places on several Sundays in November and December, 1902, but on each occasion he was refused admission by the defendants' caretakers. The plaintiffs thereupon commenced this action.

The defendants by their defence alleged that ever since the year 1869 until the present time gas referees appointed by the Board of Trade had periodically issued notifications prescribing daily testing of the gas supplied by the defendants, and the

other companies for the time being under their jurisdiction, and duly appointed gas examiners had tested the gas supplied by such companies in accordance with the Acts and notifications for the time being in force; that throughout the whole of such period such tests (to the knowledge of the gas referees and the other public authorities) had been made on week-days only and never on Sundays, and that the obligation of daily testing imposed by such Acts and notifications had been regarded and treated by the gas examiners and the public authorities as applying to week-days alone, and they adduced evidence in support of the existence of this practice, which was not really in dispute. It further appeared that since 1872 the metropolitan gas companies had suspended work on Sundays from 6 o'clock in the morning to 6 o'clock, and in some cases 10 o'clock, at night, and that the gas used on Sundays was for the most part made during the week and accumulated in the gasholders.

Hughes, K.C., and *T. T. Methold*, for the plaintiffs. In an Act of Parliament, unless there is an express provision to the contrary, Sunday is included as a day: *Peacock* v. *Reg.* (1); *Ex parte Simpkin* (2); *Rawlins* v. *West Derby Overseers* (3); and see *Calder and Hebble Navigation Co.* v. *Pilling.* (4) Therefore we say that daily testing in s. 7 of the Act of 1880 includes testing on Sundays.

Warmington, K.C., *Lord Robert Cecil, K.C.*, and *L. Rostron*, for the defendants. From the time that the daily testing of gas was first established in the metropolis to the present time, the practice has been to hold testings on week-days only. The Act of 1880 comes at the end of a series of Acts of Parliament in which the words relied on by the London County Council have been used, and it is not right to suppose that in framing that Act regard was not had to the practice which had previously prevailed. It is not suggested that s. 7 of the Act of 1880 was intended to start any new practice, and, therefore, we submit that the term "daily" in that section must be

(1) (1858) 4 C. B. (N.S.) 264.
(2) (1859) 2 E. & E. 392.
(3) (1846) 2 C. B. 72.
(4) (1845) 14 M. & W. 76.

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construed with reference to the interpretation which had been placed upon it by the parties concerned in testing gas. Expressions used in an Act of Parliament dealing with a particular trade must be used with reference to the practice and interpretation of those acquainted with the trade with which the Act deals: *River Wear Commissioners* v. *Adamson* (1); *Hawkins* v. *Gathercole* (2); *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* (3); *Yewens* v. *Noakes* (4); *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (5) The plaintiffs themselves have obtained a conviction upon the footing that Sunday was not a day within the Act of 1880. In *London County Council* v. *Gas Light and Coke Co.* (before Mr. Bushby at the Worship Street Police Court, January 9, 1891) the plaintiffs summoned the Gas Light and Coke Company under the Act of 1880 for impurity of gas manufactured on September 29, 1890. By s. 9, if the gas on any one day appeared to be of less purity than it ought to be, the average of the testings on that day and the preceding and following days were to be deemed to represent the purity of the gas on such one day. The 29th being a Monday, the testings of the Saturday, Monday, and Tuesday were taken as representing the true result. The London County Council maintained that Sunday was a dies non, and the magistrate in a considered judgment so held and convicted the company. The question whether the term "day" includes Sunday depends on circumstances, and, if the context requires it, it will be confined to working days: *Commercial Steamship Co.* v. *Boulton.* (6) When the term is used in an enactment which definitely directs work to be done, it generally means a working day. We also rely upon the Sunday Observance Act, 1676.

Hughes, K.C., in reply.

JOYCE J. The question in this case, as has been truly said by Lord Robert Cecil, is what is the meaning of the word

(1) (1877) 2 App. Cas. 743.
(2) (1855) 6 D. M. & G. 1, 20.
(3) [1898] A. C. 571, 575-6.
(4) (1880) 50 L. J. (Q.B.) 132, 135.
(5) [1891] A. C. 531, 591.
(6) (1875) L. R. 10 Q. B. 346.

"daily" in the 7th section of the Act of 1880. I think, without looking at the dictionary, one may venture to say that the primâ facie meaning of "daily" is "every day," although we have in this case the peculiar provision with reference to days which is contained in the 3rd section of the Act of 1869, which says that "the term 'day'" (subject to the exception therein mentioned) "means twenty-four hours, reckoned from nine o'clock in the forenoon of one day to nine o'clock in the forenoon of the next following day, so much of each day as is before nine o'clock in the forenoon being reckoned as part of the immediately preceding day of the month or week." Therefore it appears to me that primâ facie the effect of this 7th section of the Act of 1880 with reference to the company in question is that the gas is to be tested as thereby prescribed on every day, beginning at 9 o'clock in the forenoon of one day and ending at 9 o'clock in the forenoon of the next day. Now, if that be so, two of these days would include parts of Sunday, which, as I understand, begins at 12 o'clock on Saturday night and ends at 12 o'clock on Sunday night. It is said that from the provisions of this section the twenty-four hours from midnight on Saturday to midnight on Sunday must be altogether excluded. Upon that I observe that as I understand there is not a word or an expression of any sort or kind in any of these Acts of Parliament to suggest that that is to be the case, or that that is the intention of the Legislature. Primâ facie I should suppose that where, as here, the gas is to be supplied at all times on every day and at every hour of the day, the testing ought to take place on every day of the week.

Now, what is the argument which the defendants urge against this construction? How and where do they get any particular intent, so to speak—as it is called in one of the cases—at variance with or contrary to the literal words of the Act? Well, many not altogether relevant topics, as I consider, have been urged upon me, but the principal point is this. The defendants say that the practice from the passing of the Act of 1869 down to the passing of the Act of 1880 has been not to test on Sundays: that is to say, in other words, that the practice has been not to comply with the literal terms of the

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Act of Parliament applying to the case. Can that alter the meaning of the word "daily" in the Act of 1880? It is said that this can be done by the principle enunciated by Lord Macnaghten in the case of *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (1), where, undoubtedly, it is suggested "that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning." However, he expresses no opinion upon it. My opinion is that, if that is a sound principle upon which the Court can act in construing an Act of Parliament, the practice in this case, assuming it to be established, has not been nearly sufficient for the purpose of founding upon it any really serious argument to the effect desired by the defendants. In my opinion the words are plain. I am asked to say upon the construction of the statute that there is something intended or to be inferred contrary to the words of the Act—a construction, by-the-by, which, as it appears to me, would lead to the greatest possible difficulty in working the Act with reference to the days of the rest of the week. I do not know why that is to be inferred. I have no reason to suspect that it was brought to the attention of the Legislature when the Act of 1880 was passed that there was any such practice as is alleged before me. The result of the whole argument upon my mind is that I do not even suspect that the Legislature did not intend that which is provided in the 7th section of the Act of 1880, namely, that the testing should be daily and should be every day, without excepting Sunday in any way whatever. There will be a declaration as claimed, with liberty to apply for an injunction.

Solicitors: *Blaxland; Hicklin, Washington & Pasmore.*

(1) [1891] A. C. 591.

H. B. H.

FORMBY *v.* BARKER.

C. A.
1903
June 13, 15; *July* 14.

[1902 F. 8904.]

Restrictive Covenant—Covenant running with Land—Covenant enforceable in Equity—Personal and Collateral Covenant—Sale of all Covenantee's Land—Breach after Death of Covenantee—Right of Action by Personal Representative against Assign of Covenantor.

When on the sale of the whole of a vendor's land the purchaser enters into a covenant restricting the user of the land, the executor of the vendor cannot maintain an action for an injunction against an assign of the purchaser in respect of a breach of the covenant committed after the vendor's death.

Such a covenant is merely personal and collateral, and the principle of *Tulk* v. *Moxhay*, (1848) 2 Ph. 774, does not apply to it.

Appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster (Sir S. Hall).

The action was brought to restrain the defendant from committing a breach of a restrictive covenant relating to land.

The plaintiff was the administratrix with the will annexed of R. H. Formby, the covenantee, and he by his will gave and bequeathed all his property to her.

By a deed dated July 27, 1868, land, situate at Formby in the county of Lancaster (including some land coloured pink on a plan drawn upon the deed), was conveyed by R. H. Formby and his mortgagees to the Mutual Land Company, Limited, in fee simple.

The deed contained the following covenant by the company, for themselves, their successors and assigns, with R. H. Formby, his heirs, executors, and administrators, "that they shall not nor will exercise or permit or suffer to be exercised or carried on upon the said lands and hereditaments hereby assured or intended so to be, or any part thereof, or in or upon any building now or hereinafter to be erected thereon, any manufactory of vitriol, glass, copper, brass, iron, or any other mineral, or any alkali, or other chemical operation which shall produce any smoke or disagreeable smell, or the trade or business of a melter

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of fat, fustian dresser, pipe-maker, manufacturer of candles, soap-boiler, or any other trade, manufactory, business, or employment whatsoever which shall or may be deemed a public or private nuisance, or any annoyance or inconvenience to the neighbourhood, and shall not nor will erect, build, or make, or permit or suffer to be erected, built, or made, upon the said land any iron or brass forge or foundry, or any furnace or steam-engine, or any warehouse or other building for the deposit of goods, and shall not nor will erect, build, or make on the land coloured pink and fronting Raven Road any beerhouse or shop or any hotel of less annual value than 50*l*."

It was also thereby expressly agreed and declared that "if the said company, their successors or assigns, shall at any time hereafter during the life of the said R. H. Formby, or at any time or times within twenty-one years from the date of his decease, fail to observe, fulfil, and keep the covenants on their part hereinbefore contained, or any of them, then and in such case, and when and so often as it shall happen, it shall be lawful for the said R. H. Formby, his heirs and assigns, into the said premises, or any part thereof in the name of the whole, to enter, with full liberty, power, and authority, to pull down and remove any building contrary to the said covenants hereinbefore contained, and do any act which may be necessary specifically to perform the said covenants of the said company. Provided always that if the said company, their successors or assigns, shall not pay or reimburse to the said R. H. Formby, his heirs or assigns, all the reasonable costs, charges, and expenses which they, or any of them, shall necessarily or properly incur in or about the pulling down or removing any such buildings as aforesaid, and doing any such other act as aforesaid, and such costs, charges, and expenses shall not have been satisfied out of the rents and profits of the said premises, it shall be lawful for the said R. H. Formby, his heirs and assigns, to continue in possession of the said premises after he or they shall have pulled down and removed such buildings, until such time as the said company, their successors or assigns, shall have paid or reimbursed to the said R. H. Formby, his heirs or assigns, such costs, charges, and expenses, or until the same

shall have been satisfied out of the rents and profits of the said premises."

The deed comprised the whole of the land belonging to R. H. Formby in the neighbourhood.

This deed was never executed by the land company, but they entered into possession under the deed of the land comprised in it.

The defendant was an assignee from the land company of part of the land coloured pink and abutting on Raven Road. He acquired the land with notice of the above covenant.

R. H. Formby died on October 8, 1884, and letters of administration with the will annexed were, on January 30, 1899, granted to Caroline Formby, his widow, the plaintiff, to whom by his will he had given all his property.

In 1902 the defendant commenced to erect on part of the land coloured pink and abutting upon Raven Road two shops, and threatened and intended to complete the same. These shops were not beerhouses or beershops, but were ordinary shops unconnected with the sale of beer.

The action was commenced on September 20, 1902, and the plaintiff claimed an injunction to restrain the defendant from erecting, building, or making any shop upon the land coloured pink and abutting on Raven Road. She claimed also damages and costs.

Hall V.-C. held on the construction of the covenant that it applied only to a beershop, and that the erection of any other shop would not be a breach. The Vice-Chancellor also held that, even if there should be a breach, the plaintiff could not maintain an action in respect of a breach committed after the death of the covenantee.

The plaintiff appealed.

Neville, *K.C.*, and *F. M. Preston*, for the plaintiff. It is contended that the Vice-Chancellor has not rightly construed the covenant, and that the word "shop" is not limited to a "beershop."

The objection was taken that the plaintiff could not maintain the action, because she could not shew that any damage would

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be done to any property held by her in the same right. But she is suing as the legal personal representative of the covenantee, and it is submitted that she has the same right as he had. It was also objected that the deed was not executed by the land company. But the land came to them under the deed which contained the covenant, and has been held ever since under that deed.

The purchaser is bound to observe the restrictive covenant, for the covenantee gave consideration for it, in that by reason of it he obtained a less price for his land. The covenantee would have been entitled to enforce the covenant irrespectively of damage, and his personal representative stands in the same position.

In *Leech* v. *Schweder* (1) Jessel M.R. said that the principle was that the Court would compel a man who had voluntarily entered into a covenant to perform his contract, even if the damage caused by a breach would be trivial.

The principle of such cases as *Tulk* v. *Moxhay* (2) and *Austerberry* v. *Oldham Corporation* (3) is not limited to the life of the covenantee. The right to enforce such a covenant in equity depends upon notice to the purchaser. The basis of the doctrine is that the original purchaser gave a smaller price for the land because of the restrictive covenant, and it would be unjust that the covenantee or his estate should be deprived of part of the price which he would have obtained, but for the covenant, and also of the benefit of the covenant: *Renals* v. *Cowlishaw* (4); *Lloyd* v. *London, Chatham and Dover Ry. Co.* (5)

[VAUGHAN WILLIAMS L.J. referred to *Western* v. *MacDermott.* (6)]

The covenant was entered into in respect of land; if the covenant is unlimited as to time, why should not the representative of the covenantee enforce it?

[ROMER L.J. After the death of a lessor, could any one but the reversioner enforce the lessee's covenants?]

(1) (1874) L. R. 9 Ch. 463.
(2) 2 Ph. 774.
(3) (1885) 29 Ch. D. 750.
(4) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.
(5) (1865) 2 D. J. & S. 568, 579.
(6) (1866) L. R. 2 Ch. 72.

In that case both the benefit and the burden of the covenant would run with the land by virtue of the statute 32 Hen. 8, c. 34. In the present case the covenant does not run with the land at law.

[VAUGHAN WILLIAMS L.J. referred to *Elves* v. *Crofts*. (1)

ROMER L.J. referred to *Spencer's Case* (2); *Stokes* v. *Russell*. (3) In equity you could only sue on such a covenant in respect of some land.]

The action may be brought in respect of the land to which the covenant relates; it is not essential that the land should be in the possession of the covenantee. In the case of a building scheme each owner of a plot can enforce a restrictive covenant against any other owner, but the covenantee can also enforce the covenant, and the question has always been who besides the covenantee can enforce the covenant.

The principle was shortly stated by Lord Cairns in *Doherty* v. *Allman* (4) thus: "If there had been a negative covenant, I apprehend, according to well settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves." With regard to the right of an executor to sue on a collateral covenant, vide *Raymond* v. *Fitch*. (5) It is not necessary to prove actual damage: *Clegg* v. *Hands*. (6)

[VAUGHAN WILLIAMS L.J. The plaintiff has no estate for the benefit of which the covenant was entered into.]

(1) (1850) 10 C. B. 241.
(2) (1583) 5 Rep. 16 a.
(3) (1789) 3 T. R. 678; 1 R. R. 732.
(4) (1878) 3 App. Cas. 709, 719.
(5) (1835) 2 C. M. & R. 588, 599; 41 R. R. 797.
(6) (1890) 44 Ch. D. 503.

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There was other property adjoining which belonged to members of the vendor's family, and indeed the plaintiff herself owns some of the land comprised in the deed of 1868.

[STIRLING L.J. A legal right of re-entry is now devisable. Cannot the plaintiff take advantage of that?]

The covenant was entered into for the vendor's own benefit, and must therefore be enforced: *Osborne* v. *Bradley*. (1) The general rule is that a legal personal representative can enforce a covenant entered into with his testator or intestate unless (1.) it is a merely personal covenant, or (2.) it is a real covenant when land descends to the heir: Williams on Executors, 9th ed. pp. 696, 767, 768. If the executrix cannot enforce this covenant, the covenant will be worthless.

[VAUGHAN WILLIAMS L.J. Not during the life of the covenantee.]

There was damage to the covenantee in his lifetime by reason that his personal estate was diminished in consequence of the smaller price obtained by him for the land owing to the restrictive covenant. The principle "Actio personalis moritur cum personâ" applies only to actions of tort: Williams on Executors, 9th ed. pp. 697, 698.

As regards the construction of the covenant, it is submitted that there is no reason for limiting the general and natural meaning of the word "shop": *Leader* v. *Duffey*. (2)

Astbury, *K.C.*, and *W. Dixon MacConkey*, for the defendant. A right of re-entry cannot be reserved to a stranger to the estate, and there cannot be a right of re-entry in gross: 4 Jarman's Conveyancing, 3rd ed. p. 363. This covenant was a personal covenant in gross. A right of entry cannot be reserved to enforce an unenforceable covenant—a mere personal covenant. There is no property to which the covenant can be attached. In the case of a conditional grant of the fee, the whole fee does not pass to the grantee. In the present case the vendor granted all the land he had, and the grantee entered into a personal covenant with him, which, except as to breaches during his lifetime, died with him. There cannot be a right of re-entry in support of a right which has ceased. An

(1) Ante, p. 446. (2) (1888) 13 App. Cas. 294.

executor can enforce the specific performance of a contract with his testator which would be for the benefit of the testator's estate; but a right of re-entry cannot be reserved to a person who cannot have the benefit of the covenant.

[STIRLING L.J. In this deed the right of re-entry is reserved to the heirs and assigns. The wife is the devisee.]

A right of re-entry cannot be reserved to an executor if no estate passes to him.

[ROMER L.J. A right of re-entry must be as of the old estate. What estate was left to the vendor here?]

Even if the right to re-enter was as of the original estate, it would not be valid here. If a right of re-entry is reserved as a remedy for the violation of a right, and that right has ceased to exist, the right of re-entry goes also. In fact, here only liberty is given to enter into possession of the estate of another; no estate is left in the vendor.

This covenant is a covenant in gross for the personal benefit of the covenantee. An absolute covenant can no doubt be enforced without proof of damage. But this action is brought by a stranger to the estate. There is no estate which can benefit by the covenant. The plaintiff cannot be injured by a breach of the covenant. The case is distinguishable from *Attorney-General* v. *London and North Western Ry. Co.* (1)

The plaintiff must prove some damage to the testator's estate by a breach of the covenant after his death. In *Raymond* v. *Fitch* (2) damage was being caused to the testator's estate by felling trees. In *Chamberlain* v. *Williamson* (3) it was held that an administrator could not maintain an action of breach of promise of marriage to the intestate: *Ricketts* v. *Weaver*. (4) As regards the construction of the covenant, it is submitted that the Vice-Chancellor has construed it properly.

Neville, K.C., in reply. The questions are—(1.) whether there can be such a covenant in gross; (2.) whether the rule "Actio personalis moritur cum personâ" applies.

(1.) There can be something very like an easement in

(1) [1900] 1 Q. B. 78.
(2) 2 C. M. & R. 588; 41 R. R. 797.
(3) (1814) 2 M. & S. 408; 15 R. R. 295.
(4) (1844) 12 M. & W. 718, 723.

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gross. In *Renals* v. *Cowlishaw* (1) both Hall V.-C. and the Court of Appeal thought there could be a restrictive covenant in gross.

[ROMER L.J. Is there any case in which it has been held that such a covenant purporting to bind land for ever is valid except for the protection of an estate?]

Renals v. *Cowlishaw* (1) goes a long way in that direction.

[VAUGHAN WILLIAMS L.J. referred to *Nottingham Patent Brick and Tile Co.* v. *Butler*. (2)]

In that case the question was who besides the covenantee could sue upon the covenant. It has never been doubted that the covenantee and his personal representative can sue: *Spicer* v. *Martin*. (3)

[ROMER L.J. An executor must sue as an assign of the covenant.]

The heir would also sue as an assign. And if he had other land in the neighbourhood the covenant would be of value to him. If an assign could sue, the covenantee would not lose his right to sue. He might have intended to purchase other land in the neighbourhood. If Formby could sue on the covenant, the objection that it is a covenant in gross fails. (2.) In *Beckham* v. *Drake* (4) Parke B. said that an executor never could sue for wrongs to his testator, nor could he sue upon contracts the breach of which was a mere personal wrong, but he takes all the other personal rights of the testator. The breach of this covenant is not a mere personal wrong. The covenant touches and concerns the land, and it runs with the land in equity. The covenant is supported by a right of re-entry for breach of it, and this right would pass to the heir or devisee: *Wood* v. *Leadbitter*. (5) If, as is admitted, Formby in his lifetime could have sued on the covenant without proving any damage, there is no reason why his executor or devisee should not equally be entitled to sue: *Leech* v. *Schweder*. (6) The consideration given does not attach to the vendor only.

(1) 9 Ch. D. 125; 11 Ch. D. 866.
(2) (1886) 16 Q. B. D. 778.
(3) (1888) 14 App. Cas. 12.
(4) (1849) 2 H. L. C. 579, 624, 625.
(5) (1845) 13 M. & W. 838.
(6) L. R. 9 Ch. 463.

The consideration was given once for all, and the bargain is as sacred in the view of a Court of Equity in either case.

Cur. adv. vult.

July 14. VAUGHAN WILLIAMS L.J. read the following judgment:—The plaintiff sues in her individual capacity and also as administratrix with the will annexed of R. H. Formby, deceased.

By a deed of July 27, 1868, R. H. Formby, the owner of land at Formby in Lancashire, and his mortgagees conveyed that land to the Mutual Land Company in fee simple. The deed contained a covenant on their part which was intended to be executed by them; but in fact they did not execute the deed. As, however, they took possession of the land by virtue of the deed and the defendant claims under them, the non-execution of the deed by the company only results in this—that their rights thereunder are merely equitable, because there is no legal covenant.

The statement of claim is based upon the allegation that the land company did covenant as follows: [His Lordship read the covenant as above stated, and continued:—]

The defendant, who claims the pink land through the land company by virtue of divers mesne assignments, threatens to build a shop on that land. The shop is not a beerhouse or beershop, but some shop wholly unconnected with beer, and the first question which has to be decided is whether the building of such a shop would be a breach of the covenant. That depends upon the construction of the covenant. The plaintiff says that there is nothing in the covenant to limit the word shop, and that it means any shop. The defendant, on the other hand, says that the word "shop" in the covenant means beershop.

The plaintiff says that, if the words are construed according to their natural meaning, there is nothing to lead one to qualify the word "shop" by the word "beer," and that, if the parties to the deed had intended "beerhouse" and "beershop" in their technical sense with regard to the licensing

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laws, nothing would have been easier than to say in terms "any beerhouse or beershop," and that, taking the covenant as a whole, there is nothing in it or in the deed which makes it manifestly absurd to give the word "shop" the meaning of shop generally.

The defendant, on the other hand, argues that the collocation of the words "beerhouse or shop," followed by the words "or any hotel," suggests that the intention of the parties to the deed was to divide the subject-matter into two classes, one being "beerhouse or shop" and the other being "hotel," and that this accounts for the introduction of the word "any" before the word "hotel," and that, if the parties to the deed had intended to divide the subject-matter of the covenant so as to make it apply to three distinct things—(1.) beerhouse, (2.) shop, (3.) hotel—it would have been natural for the draftsman to have expressed this by the words "beerhouse or shop or hotel of less annual value than 50*l*.," and that there would have been no necessity to introduce the word "any" before the word "hotel." The plaintiff contends that the words "of less annual value than 50*l*." apply only to the word "hotel," and that this accounts for the introduction of the word "any" before the word "hotel."

The covenant is, I think, ambiguous. I am, however, inclined to think that the words "of less annual value than 50*l*." apply only to the hotel, but I doubt if this helps the plaintiff. The enumeration begins with "beerhouse," unqualified by any limitation as to the minimum annual value, and concludes with "hotel of not less annual value than 50*l*." This contrast seems to me to indicate that the parties meant, "You are not to erect, build, or make on the land coloured pink any beerhouse whatever, and you are not to erect, build, or make on the land any hotel of such a low value that its user and substantial trade is likely to be rather for the sale of beer than for the reception of guests."

The word "hotel" is defined in a dictionary which I have consulted as "a genteel inn, or superior lodging-house," and I think that the word "hotel" always imports a house where travellers are taken in to lodge, and a licensed hotel is licensed

for the sale (inter alia) of beer. The covenant prohibits a beer-house, and prohibits a hotel, where presumably beer may be sold, unless the annual value of it is such that it is not likely to be used by the class who use beerhouses. If this is the right view, as in my opinion it is, I think we ought to read "shop" as meaning "beershop."

This view really puts an end to the plaintiff's case. But, as another defence was raised and was discussed by the learned Vice-Chancellor, I think it right to deal with that point also.

The learned Vice-Chancellor expressed an opinion that, even if the plaintiff's construction of the covenant was right, and there had been a breach of the covenant, nevertheless the plaintiff was not entitled to sue—that is, was not entitled to sue either as personal representative of R. H. Formby or as residuary devisee under his will.

I agree with the conclusion of the Vice-Chancellor that there is nothing in the point made by the defendant of the non-execution of the deed by the company other than this—that there is no legal covenant. I have no doubt that the land company took the estate conveyed subject to the condition contained in the covenant, and I have no doubt that Formby during his life could have enforced that condition, and, as I am inclined to think, even by an action for damages.

Before dealing with the question of the plaintiff's right to sue, I wish to point out that that which R. H. Formby conveyed was his whole estate, and that he had no contiguous estate which would be benefited by the covenant in question. Moreover, there is in the deed no re-entry clause under which the vendor could go in as of his old estate, or, indeed, as of any estate.

In my judgment this covenant is a personal covenant, but I do not think that, having regard to the opinions of the judges delivered in the House of Lords in *Beckham* v. *Drake* (1), the right of action, which, in my judgment, would have vested in R. H. Formby on a breach in his lifetime, is of such a character that a breach after his death would not give

(1) 2 H. L. C. 579.

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to his personal representative a right of action against the covenantors, the land company.

The maxim "Actio personalis moritur cum personâ" has no application to any breaches of contract, except those which constitute a mere personal wrong, and, with that exception, all rights of action for breaches of contract pass to the executors, and in an action for breach of covenant or condition proof of damage is not essential, and, in my judgment, there has been in this case, if the plaintiff's construction of the covenant is right, a plain breach of the covenant, which breach is not a mere personal wrong.

I make these observations to dispose of the argument addressed to us on the maxim "Actio personalis moritur cum personâ." But this still leaves the difficulty that the defendant is not a party to the deed, and that there is plainly no covenant running with land on which the defendant could be sued at law. It becomes necessary, therefore, to see whether an action for an injunction can be brought, upon the principle established by the judgment of Lord Cottenham L.C. in *Tulk* v. *Moxhay*. (1) Now in the marginal note of that case it is said: "A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law." But at the beginning of the Lord Chancellor's judgment he said (2): "That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed." These words do not cover the present case, because the land company did not purchase a part only of the vendor's land, but the whole of it. It becomes necessary, therefore, to ascertain whether the principle of *Tulk* v. *Moxhay* (1) applies to a case in which the vendor sells his whole estate. I have not been able to

(1) 2 Ph. 774. (2) 2 Ph. 777.

find any case in which, after the sale of the whole of an estate in land, the benefit of a restrictive covenant has been enforced by injunction against an assignee of the purchaser at the instance of a plaintiff having no land retained by the vendor, although there are cases in which restrictive covenants seem to have been enforced at the instance of plaintiffs, other than the vendor, for the benefit of whose land it appears from the terms of the covenant, or can be inferred from surrounding circumstances, that the covenant was intended to operate. In all other cases the restrictive covenant would seem to be a mere personal covenant collateral to the conveyance. It is a covenant which cannot run with the land, either at law or in equity, and therefore the burden of the covenant cannot be enforced against an assignee of the purchaser.

But it is said that the doctrine of *Tulk* v. *Moxhay* (1) is independent of the question whether there is in law or in equity a covenant running with the land, and that the doctrine is based upon obligations on the conscience of a person taking an estate with notice of a restrictive covenant binding it. The answer, I think, is to be found in a passage in the judgment of Collins L.J. in *Rogers* v. *Hosegood*. (2) He said: "These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land, before the question of the purchaser's conscience and the equity affecting it can come into discussion."

(1) 2 Ph. 774.

(2) [1900] 2 Ch. 388, 407.

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It seems to me that in the passage I have just read Collins L.J. assumes that the doctrine of *Tulk* v. *Moxhay* (1) will not apply to a contract which is merely personal and collateral. In my judgment the covenant in the present case is merely personal and collateral; it has not been entered into for the benefit of any land of the vendor, or of any land designated in the conveyance; it is a covenant which, in my judgment, would not pass to the heirs of the vendor, notwithstanding the words of the covenant are, "covenant with the said R. H. Formby, his heirs, executors, and administrators." There is no land designated to which the word "heirs" can be applied. R. H. Formby could have sued the purchasers for breaches in his lifetime, and I think that his executrix could have sued the purchasers for breaches after his death, but I do not think that the executrix can sue the assignee of the purchasers. There is no contractual privity and no relation of "dominancy" and "serviency" of lands which will enable an action to be brought against a person not a party to the original contract, nor do I think that the benefit of this covenant could be dealt with by a devise.

There is the following passage in the judgment of Jessel M.R. in *London and South Western Ry. Co.* v. *Gomm* (2): "The doctrine of *Tulk* v. *Moxhay* (1), rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (3) to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light." Again, Jessel M.R. said: "This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement."

I think that in both these paragraphs Jessel M.R., whether describing the doctrine of *Tulk* v. *Moxhay* (1) as an extension

(1) 2 Ph. 774.
(2) (1882) 20 Ch. D. 562, 583.
(3) 5 Rep. 16 a.

of *Spencer's Case* (1) or of the equitable doctrine of negative easements, regards it as something arising from the relation of two estates one to the other.

I have only to add that I do not think that either the passage which I am about to quote from the judgment of Knight Bruce L.J. in *De Mattos* v. *Gibson* (2), or the statement of the law by Lord Cairns L.C. in *Doherty* v. *Allman* (3), in any way militates against the conclusion at which I have arrived, that, when a negative or restrictive covenant is imposed upon the user of land, it will not be enforced against an owner who was not a party to the deed containing the covenant, if the covenant is merely personal and collateral to a conveyance of land.

If it is said that the following statement of Knight Bruce L.J. (4)—"Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. This rule, applicable alike in general as I conceive to movable and immovable property, and recognised and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no room for any exception in the instance before us"—negatives the above conclusion, because it shews that the doctrine of *Tulk* v. *Moxhay* (5) applies to personal as well as real property; I answer, first, that the basis of that statement of Knight Bruce L.J. is rather the principle of *Lumley* v. *Wagner* (6) than that of *Tulk* v. *Moxhay* (5); and, secondly, that it is plain the learned judge would not have thought an injunction ought to have been granted if the

(1) 5 Rep. 16 a.
(2) (1858) 4 De G. & J. 276, 282.
(3) 3 App. Cas. 709, 719.
(4) 4 De G. & J. 282.
(5) 2 Ph. 774.
(6) (1852) 1 D. M. & G. 604.

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plaintiff had assigned the charterparty, nor unless the plaintiff had sustained material damage. And, as to what Lord Cairns said in *Doherty* v. *Allman* (1), it only shews that proof of damage is not necessary for the granting of an injunction in a case in which the parties to a contract for valuable consideration, with their eyes open, contract that a particular thing shall not be done.

I think that for the reasons which I have given the decision of the Vice-Chancellor was right on both points, and that the appeal should be dismissed with costs.

ROMER L.J. read the following judgment:—I agree with the Lord Justice that we ought not to differ from the view taken by the Vice-Chancellor as to the true construction of the covenant in question. I also agree in thinking that in this case, even if there has been a breach of the covenant, the administratrix of the covenantee is not entitled to an injunction. If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object. It appears to me that it is not legally permissible for him to assign the benefit of such a covenant to any person or persons he may choose, so as to place the assign or assigns in his position, with power again for them to assign, and so on indefinitely. Clearly at law such a right or power to assign does not exist, and in equity up to the present time no such right has been recognised. To admit a right to obtain an injunction in such a case in any assign would be to extend the principle of *Tulk* v. *Moxhay* (2) far beyond what is, in my opinion, justifiable. And, for the purposes of the present case, the administratrix can only be regarded, and can only be entitled (if at all) to any relief in the capacity of an assign of the covenant, for the alleged breach of the covenant relied on took place after the death of the covenantee. I think, therefore, that on this ground also the appeal fails.

(1) 3 App. Cas. 709, 719. (2) 2 Ph. 774.

STIRLING L.J. read the following judgment:—I agree with my brethren on both points. On the question of construction I do not desire to say anything further; but on the other point, which is one of general interest, I should like to add the following observations. The material facts appear to be these: By a deed of July 27, 1868, R. H. Formby, upon a sale by him of real estate, conveyed that estate to the purchasers subject to restrictive covenants, expressed to be entered into by the purchasers with him, his heirs, executors, and administrators. At the date of this deed R. H. Formby was not entitled to any land, freehold, copyhold, or leasehold, other than that which was thereby conveyed. Consequently he was not at that date, nor (if it be material) did he subsequently become, entitled to any land for the protection or benefit of which the restrictive covenants were or could be intended. The plaintiff is his administratrix and universal legatee.

In fact the deed of 1868 was not executed by the purchasers, and consequently there was no covenant as between the vendor and purchasers which could be enforced at law. But, with reference to the question whether the obligation intended to be imposed on the purchasers can be enforced in equity, this is immaterial. If the plaintiff, however, is in no worse position than if such a covenant had existed, she is not in any better position, and it seems to me desirable to consider what her rights would have been in that case. She might then have brought an action at law, but I have difficulty in seeing that she could have recovered more than nominal damages. However, if substantial damages could be recovered, it would seem to be the duty of the plaintiff to resort to that remedy, for thus only could the personal estate which it is her duty to protect be benefited. I think that, in the absence of special circumstances not found in the present case, damages would not only be an adequate, but the most appropriate remedy.

This being so, I do not think that a Court of Equity ought to interfere in her favour by way of injunction. If it did, I do not see why the like relief should be denied to any duly constituted legal personal representative of R. H. Formby, at any time, however remote, assuming always that matters

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remained as they were at the date of his death. This seems to me to amount to a reductio ad absurdum of the plaintiff's claim.

To avoid misconception, I wish to add that in my opinion different considerations would apply if the action had been brought by R. H. Formby in his lifetime.

Solicitors: *Pritchard, Englefield & Co., for Simpson, North & Co., Liverpool; Chester & Co., for Alfred Stephenson, Liverpool.*

W. L. C.

C. A. 1903 *May* 6, 27; *July* 25.

BOYCE *v.* PADDINGTON BOROUGH COUNCIL.

[1901 B. 3303.]

Open Space — Disused Burial Ground — Adjacent Landowner — Right to Access of Light—Local Authority—Extent of Powers—Joinder of Attorney-General—Metropolitan Open Spaces Act, 1877 (40 & 41 *Vict. c.* 35), *s.* 1—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *ss.* 4, 5—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

A borough council, in whom, under the Metropolitan Open Spaces Acts, 1877 and 1881, and the Disused Burial Grounds Act, 1884, the management and administration of a disused churchyard as an open space were vested, proposed to erect on the ground a screen for the purpose of preventing an adjoining landowner, who had built on his land houses which overlooked the churchyard, from acquiring any right of light which would diminish or injuriously affect the enjoyment by the public of the churchyard as an open space.

In an action by the Attorney-General at the relation of the landowner, and by the landowner, to restrain the erection of the screen :—

Held, that in erecting the screen the council would be holding and administering the ground otherwise than for the purpose of its enjoyment by the public in an open condition and for no other purpose, as prescribed by s. 5 of the Act of 1881, and that the council must be restrained from erecting the screen.

Semble, that the landowner could not have maintained the action in the absence of the Attorney-General.

Decision of Buckley J., [1903] 1 Ch. 109, reversed.

APPEAL from the decision of Buckley J. (1)

The action was originally brought by the plaintiff Boyce alone to restrain the defendants from erecting on a disused

(1) [1903] 1 Ch. 109.

burial ground, which was an "open space" within the Metropolitan Open Spaces Acts, 1877 and 1881, a hoarding or screen, to prevent the plaintiff from acquiring a right to the access of light over the open space to the windows of some houses which he had recently built upon land abutting on the open space.

The churchyard of St. Mary's, Paddington, was a "disused burial ground" within the meaning of the above Acts and the Disused Burial Grounds Act, 1884.

By a faculty dated May 12, 1884, granted by the Bishop of London, the vestry of Paddington were authorized to make improvements and alterations in the churchyard, provided that the faculty should not in any way prejudice the jurisdiction of the Court of the bishop in respect of the churchyard.

In pursuance of the faculty the improvements and alterations were accordingly made by the vestry.

By a deed dated April 26, 1892, and made between the Rev. Walter Abbott, vicar of Paddington, of the one part, and the vestry of Paddington of the other part, it was agreed that the vestry should undertake the entire management and control of the churchyard, and should hold and administer the powers of management and control acquired by them under the agreement in manner and subject to the conditions prescribed by the Act of 1881, and to the terms of the agreement, but that nothing in the agreement should be deemed to affect the right of the Rev. Walter Abbott, as vicar of Paddington, or his successors, to the soil or freehold of the churchyard.

By a faculty dated December 1, 1892, granted by the Bishop of London, the vestry were authorized to exercise all the powers of management in the Act of 1881 mentioned, subject to the provisions of the agreement of April 26, 1892; provided that the management of the churchyard was subject to the jurisdiction and control of the Court of the bishop, and reserving to that Court jurisdiction from time to time thereafter to make such order or orders in the premises as to the vicar-general for the time being of the bishop might seem meet and just.

The defendant council were the successors in title of the vestry by virtue of the London Government Act, 1899.

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The plaintiff had erected and was erecting on land abutting on the churchyard blocks of flats, which had windows overlooking the churchyard.

On January 8, 1901, the council passed a resolution directing their surveyor to erect a screen in the churchyard in front of the windows of the plaintiff's premises.

The plaintiff alleged that the screen if erected would materially interfere with the access of light to the windows of his premises overlooking the churchyard, and with the reasonable and comfortable enjoyment of the premises by him and his tenants in occupation thereof.

The defendants to the action were the borough council and the vicar, who was a member of the council, and was also sued as vicar.

The plaintiff claimed an injunction to restrain the defendants from erecting or building any screen, wall, or other building whatsoever in the churchyard so as to occasion nuisance, annoyance, or damage to the plaintiff and his tenants or other the persons in occupation of his premises.

In their defence the council said: "The action of the defendant council in threatening to erect the said screen has been taken solely in performance of their public duty as trustees by virtue of the said Acts, and the sole purpose of erection was to prevent the plaintiff, as the owner or occupier of land adjoining the said churchyard, from acquiring any rights of light or air which would diminish or injuriously affect the enjoyment by the public of the said churchyard as an open space."

At the trial of the action Buckley J. held that the plaintiff was entitled to sue without joining the Attorney-General as a co-plaintiff. But the learned judge held that the Acts did not create any easement of light or otherwise for the benefit of adjoining owners, and that the screen was not a building within s. 5 (1) of the Act of 1881, or s. 3 of the Act of 1884. The action was accordingly dismissed with costs.

The plaintiff appealed.

(1) Sect. 1 of the Metropolitan Open Spaces Act, 1877, enabled the Metropolitan Board of Works to "acquire or accept the ownership of

May 6. *Astbury, K.C.*, and *Mark Romer*, for the plaintiff Boyce. The plaintiff is suing in respect of an alleged private

any open spaces . . . . , situated in the metropolis, and hold the same in trust for the perpetual use thereof by the public for exercise and recreation."

By the Metropolitan Open Spaces Act, 1881, s. 4, "The owner of any churchyard, cemetery, or burial ground situate within the metropolis, and closed for burials either under an order of Her Majesty the Queen in Council, or otherwise, may convey the soil of such churchyard . . . . or grant any term of years or other limited interest therein to or enter into any agreement with the Metropolitan Board or the vestry or district board of the parish or district in which such churchyard . . . . or any part thereof, is situate, for the purpose of giving the public access to the said churchyard . . . . and preserving the same as an open space accessible to the public, and under the control of such board or vestry, and for the purpose of improving and laying out the same."

By s. 5, "The Metropolitan Board and the vestry or district board of the parish or district within which any open space, churchyard . . . . or any part thereof, is situate may, by agreement, and for valuable or nominal consideration . . . . or without any consideration, take and hold the soil and freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over any open space, churchyard &c. and may, with reference to any open space, churchyard &c. undertake the entire or partial care, management, and control thereof, whether any interest in the soil is transferred to the board or vestry or not, and may for the purposes aforesaid enter into any agreement with the persons authorised by this Act to agree with reference to any open space, churchyard &c. or with any other persons interested therein.

"Any estate or interest in or control over any open space, churchyard &c. acquired by the Metropolitan Board, or any vestry or district board under the provisions of this Act, shall be held and administered by such board or vestry in trust to allow, and with a view to, the enjoyment by the public of such open space, churchyard &c. in an open condition, free from buildings, and under proper control and regulation, and for no other purpose, ... and the board or vestry shall maintain and keep the same in a good and decent state, and may inclose or keep the same inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, seat, and otherwise improve the same, and do all such works and things, and employ such officers and servants, as may be requisite for the purposes aforesaid, or any of them.

"Provided that no board or vestry shall exercise any of the powers of management in this Act mentioned with reference to any consecrated ground, unless and until they are authorized so to do by the licence or faculty in that behalf of the bishop of the diocese in which such consecrated ground is situate . . . ."

By the Disused Burial Grounds Act, 1884, s. 3, "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

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right, or in respect of an interference with a public right from which, in his private capacity, he suffers special damage; he can therefore maintain this action without joining the Attorney-General as co-plaintiff: *Winterbottom* v. *Lord Derby*. (1) The plaintiff as the owner of windows looking over the open space must suffer more damage from the hoarding than the rest of the public; besides, he has an inchoate right to light which the hoarding will prevent his acquiring; if the plaintiff shews, as he does, that he is likely to sustain direct, private, and substantial damage beyond the general injury caused to the public, he can maintain the action: *Benjamin* v. *Storr*. (2)

[VAUGHAN WILLIAMS L.J. So far as you base your claim on any right of property, *Benjamin* v. *Storr* (2) does not help you.]

In any event the plaintiff is a member of the public who is specially injured by this public wrong.

What the borough council propose to do is not within any of the above-quoted sections. The object of the defendants in putting up the hoarding was to prevent the plaintiff from acquiring an easement of light over the open space.

[ROMER L.J. referred to *Bonner* v. *Great Western Ry. Co.* (3)]

In that case the railway were the absolute owners of the line, and the space opposite Bonner's property was not land on which various Acts of Parliament had said that no buildings were to be erected.

A hoarding of the size proposed is a "building"; it is certainly not a fence or "railings" for inclosing the land. A hoarding is a "building" unless some special meaning has been given it as in *Foster* v. *Fraser*. (4) An open trellis screen has been held to be a building: *Wood* v. *Cooper*. (5)

[Before the argument for the plaintiff had been concluded the Court suggested a settlement on the terms that the plaintiff should undertake not to claim any prescriptive right to

(1) (1867) L. R. 2 Ex. 316.
(2) (1874) L. R. 9 C. P. 400.
(3) (1883) 24 Ch. D. 1.
(4) [1893] 3 Ch. 158.
(5) [1894] 3 Ch. 671.

light by reason of the screen not being erected, and that the council should undertake not to erect the screen. The plaintiff was willing to give the undertaking proposed on his part, and the appeal was ordered to stand over in order to ascertain whether the council would give the undertaking proposed on their part.]

May 27. *H. Terrell, K.C.*, for the council, informed the Court that the council were not willing to give the undertaking, but wished to have the question of law decided by the Court.

THE COURT intimated their opinion that it would be better that the Attorney-General should be added as a plaintiff in respect of the rights of the public.

Astbury, K.C., asked that the appeal might stand over to enable his clients to communicate with the Attorney-General.

THE COURT assented.

The Attorney-General having authorized the use of his name, the writ and the statement of claim were amended by adding him as a plaintiff, at the relation of the plaintiff Boyce, and by adding an allegation that the screen if erected would constitute a breach of the provisions of the Acts.

And the claim was altered to a claim for an injunction to restrain the defendants from erecting any screen, &c., for the purpose of obstructing the access of light to the plaintiffs' windows, and from erecting or building any other screen, wall, or building upon the churchyard in breach of the provisions of the said Acts.

July 25. The appeal was placed in the paper again for hearing.

Astbury, K.C., and *Mark Romer*, for the plaintiffs. The real object of the council is to compel the plaintiff as owner of adjoining land to contribute to the expense of maintaining the

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open space. Sect. 5 of the Act of 1881 provides that the local authority are to hold the open space "with a view to the enjoyment thereof by the public in an open condition free from buildings, and for no other purpose." The council are proposing to hold this open space for the purpose of compelling an adjoining landowner to contribute to the expense of maintenance. The freehold of the churchyard is still vested in the vicar; he has only parted with the management of the churchyard. The erection of the screen would not be a user of the land in accordance with the provisions of the statutes.

H. Terrell, K.C., and *T. A. Nash*, for the council. When the action was tried by Buckley J. it was an action by a private owner of land alone. By the amendment a new cause of action and a new plaintiff are introduced, and the question is one of public rights. As against the Attorney-General the council say that they propose to erect the screen in discharge of their duty as trustees, and to prevent the plaintiff from acquiring a right to the access of light. The question depends upon the construction of s. 5 of the Act of 1881. It is the duty of the council to hold this ground and preserve it as an open space with a view to its enjoyment by the public. If the council have no power to erect this screen the open space may be surrounded with huge blocks of flats, and its value to the public would be thus seriously affected.

[VAUGHAN WILLIAMS L.J. The correspondence which is in evidence shews that the council had no objection to the plaintiff's buildings if he would grant them a right of way across his land to the open space. The Legislature did not intend to take away the common law right of a landowner to build on his own land.]

The council do not propose to erect any building on the land. The erection of a screen will not prevent the land from being an open space. It would not interfere with the rights of the public.

[VAUGHAN WILLIAMS L.J. The council claim the right to erect a hoarding all round the ground.]

The screen which the council propose to erect will probably not block out the whole of the plaintiff's light.

[VAUGHAN WILLIAMS L.J. The council claim the right to block out every window.]

There is nothing in the statutes to prevent the erection. The onus is on the plaintiffs to shew that there will be a breach of the statutes. The cases to which Buckley J. referred in his judgment shew that a screen is not necessarily a "building," and it will not prevent the enjoyment of the ground as an "open space": *Bowes* v. *Law*. (1)

C. A. Montague Barlow, for the vicar.

VAUGHAN WILLIAMS L.J. As regards the vicar, he took no part as vicar in the threat to erect this screen or hoarding, and as against him there is no cause of action. Therefore, as against him the action must be dismissed. And we think that under the circumstances we ought not to interfere with the order as to costs made by Buckley J. so far as the vicar is concerned. That only refers to the proceedings below. But having regard to what has happened here on the appeal, we think that the vicar ought not to have any costs of the appeal. I will now deal with the case as against the borough council.

[His Lordship read the above-quoted paragraph in the defence of the council, and continued:—]

At the trial of the action it was said on behalf of the plaintiff that the proposed erection by the council of this screen was an act not covered by the authority conferred on them by the Acts which determine their duties as trustees, and also that the erection of such a screen would interfere with the enjoyment by the public of the churchyard as an open space. In answer to this it was said on behalf of the defendants that these complaints could not be made by a private individual, and that the Attorney-General ought to be a party to the action. In my judgment that was a good objection, but Buckley J. overruled it.

When the appeal came before us, after a fruitless attempt to get the matter settled as between the borough council and the plaintiff, so as to avoid any further litigation, we thought it our duty to say that the Attorney-General ought to be

(1) (1870) L. R. 9 Eq. 636.

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approached in order that he might judge whether he thought he ought to be added as a plaintiff. When he was so approached he was of opinion that he ought to be added as a plaintiff, and he has been accordingly added. We are now in a position to determine the question as between the Attorney-General, representing the public, and the borough council. In my judgment, taking the council's own avowal in the passage which I have read from their defence, that which they are threatening to do is inconsistent with their duties as prescribed in the statutes governing those duties. [His Lordship referred to the sections of the Acts above set out and to the agreement of April 26, 1892, and continued :—]

Under that agreement the vestry did not become in any sense the owners of the soil, but they took over the management of the open space. The question for our determination is whether the council as managers of this open space have the right to erect the screen which they threaten to erect, and for the purpose for which they propose to erect it. In my judgment they have no such right. In my opinion in erecting the screen they would be holding and administering the open space for a purpose other than its enjoyment by the public in an open condition within the meaning of s. 5 of the Act of 1881. In my judgment, quite apart from the express prohibition of the erection of buildings, the erection of this screen would not come within the powers of the managers in administering this open space. I think they would be erecting the screen for a purpose other than the enjoyment of the open space by the public; and, speaking for myself, I think that, having regard to the wide right which is claimed by the council, what they are proposing to do would in all probability interfere with the enjoyment by the public of the open space. I desire to add that I am not disposed to read the word "buildings" in the limited sense in which Buckley J. read it. Some light is thrown upon the limitation of the authority of the council by the provision that they may inclose the open space "with proper railings and gates." In my judgment they have no right to inclose it wholly or partly with a screen of this kind. They may say that they do not

intend to put up the screen for the purpose of inclosure. But in fact it would partially act in that way. At all events, they have no right to put up the screen for the purpose for which they themselves avow that they intend to put it up. In so doing they would not be using the open space "for the enjoyment by the public and for no other purpose." Under these circumstances an injunction must be granted to restrain the borough council generally from using this open space in any other manner than that specified in the Act, and it will be proper to insert in the order the very words of the section; and also to restrain the council from erecting this particular screen. And it must be added that the injunction is not to prevent the council from inclosing the open space with proper railings and gates. The plaintiff must have the costs of the appeal against the council; but under the circumstances I think that as between the plaintiff and the council there should be no costs in the Court below.

ROMER L.J. I agree.

COZENS-HARDY L.J. I also agree. I do not desire to base my judgment upon this screen or hoarding being or not being a "building" within the meaning of s. 5. The matter may, I think, be dealt with on much broader grounds. The council have control over this open space. It is to be "held and administered" by them "in trust to allow, and with a view to, the enjoyment by the public . . . . in an open condition, free from buildings, and under proper control and regulation, and for no other purpose," and the subsequent words of the section which authorize the inclosure, draining, &c., and the doing of "all such works and things," is further limited by the final words—"as may be requisite for the purposes aforesaid, or any of them." Under those words it would, I apprehend, be competent to the council to erect a tool-house for the gardeners, or anything requisite for the purpose of the enjoyment of the open space by the public. But, as it seems to me, it would not under the powers conferred by this section be competent to the council to use their interest

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in the disused burial ground either for the purpose of compelling an adjoining owner to give the public a right of way elsewhere, or to prevent the acquisition by him of any rights in respect of any new building which he may erect on his land.

As to the form of the order, we think that the injunction should be as follows: "That the defendant council be restrained from holding, administering, or using the disused burial ground in question for any purposes other than the purposes pointed out in that behalf by s. 5, and in particular from using the said ground for the purpose of erecting thereon any building or screen to prevent the access of light coming over the said ground to the plaintiff's windows, provided that nothing in this injunction is to prevent the council from inclosing the said ground, or keeping it inclosed with proper railings and gates."

Solicitors: *Cheston & Sons; J. H. Hortin.*

W. L. C.

WHITE *v.* METCALF.

KEKEWICH J.

1903

July 2.

[1902 W. 2337.]

Mortgage—Foreclosure—Account—Allowances—Cost of Repairs — Mortgagee out of Possession—Receiver—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 24, *sub-s.* 8 (*iii.*).

First mortgagees of leasehold premises, acting under the powers of the Conveyancing and Law of Property Act, 1881, appointed as receiver the manager of a guarantee society which had guaranteed them against loss on their mortgage. The mortgagors were under covenant with their lessor to keep the premises in repair, and were under covenant with the first mortgagees to observe the covenants of the lease. The premises being out of repair, the receiver put them into repair and paid the cost out of moneys found by the society. These repairs were not authorized in writing by the first mortgagees, and the cost of them was in excess of the rents and profits in the hands of the receiver. In an action for foreclosure by the first mortgagees against the second mortgagee and the mortgagors :—

Held, that, in taking the account of what was due to the first mortgagees under their security, the cost of these repairs (assuming them to be necessary and proper) ought not to be allowed, whether such cost was to be treated as a payment by the receiver or by the first mortgagees themselves.

The position of a receiver under the Conveyancing and Law of Property Act, 1881, discussed.

THE plaintiffs were first mortgagees of a leasehold block of flats under a mortgage of September 22, 1899.

The defendants Metcalf and Thomas R. Greig were the leaseholders and mortgagors, and the defendant Rawlinson was the second mortgagee, of these premises. The defendant James R. Greig was the mortgagor of other property comprised in the security of the defendant Rawlinson.

At the date of the mortgage of September 22, 1899, the plaintiffs effected with the Law Guarantee and Trust Society a policy of assurance or indemnity whereby in effect the society guaranteed the plaintiffs against loss in respect of their mortgage security.

On March 5, 1902, the plaintiffs, in exercise of the power in that behalf conferred on them by the Conveyancing and Law of Property Act, 1881, appointed Mr. T. R. Ronald, who was the general manager of the Law Guarantee and Trust Society,

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receiver of the rents and profits of the mortgaged premises, and he entered into the receipt of such rents and profits accordingly, and continued to receive the same down to the present time.

By the lease under which the mortgaged premises were held, the mortgagors as lessees were under covenant to repair and keep in repair the said premises, and they were also under covenant with the plaintiffs to observe and perform the covenants of the lease during the continuance of the mortgage security. It was alleged by the plaintiffs that the mortgagors had not fulfilled these covenants, and that considerable repairs were necessary to the mortgaged premises for the purpose of preserving them and in order to facilitate the letting of the several flats therein comprised, and a sum of 217*l.* 7*s.* 6*d.*, without any direction in writing by the plaintiffs, was expended by Mr. Ronald on the premises in carrying out these repairs.

This money was supplied by the society, the rents and profits of the mortgaged premises being barely more than sufficient to keep down the ordinary outgoings payable in respect thereof.

On July 10, 1902, the plaintiffs commenced an action by originating summons for foreclosure. On August 11 they obtained an order nisi for foreclosure on the footing that they were not in possession of the mortgaged premises, and the usual account was directed of what was due to the plaintiffs under and by virtue of their security. In taking the account the question arose whether the plaintiffs were entitled to be allowed the cost of the repairs done to the mortgaged premises. The plaintiffs took out this summons in the action for the purpose (among other things) of having this question determined.

Beaumont, for the plaintiffs. Treating this expenditure as having been incurred by the plaintiffs—and for this purpose the fact that they are guaranteed against loss is immaterial—I submit that a mortgagee who has incurred expenditure in executing necessary repairs to the mortgaged premises is entitled to be allowed that expenditure in taking the account of what is due to him under his mortgage in a foreclosure action.

Warrington, K.C., and *E. P. Hewitt*, for the defendants.

The receiver had no authority to spend money on these repairs, for by the terms of the Conveyancing Act, 1881, under which he was appointed, he is receiver only of the income of the mortgaged property, and he can only incur expenditure to the extent of the moneys which he receives, and in this case the rents and profits are not sufficient to provide for the cost of the repairs; and, further, he cannot expend money on repairs unless expressly authorized in writing by the mortgagee (see ss. 19, 24). If this expenditure is to be treated as having been incurred by the plaintiffs, a first mortgagee out of possession cannot voluntarily spend money on repairs which ought to have been executed by the mortgagor and charge the cost of those repairs against the second mortgagee. If the repairs are urgent he may go into possession and do them, but he cannot do them without going into possession.

[They cited *In re Leslie* (1); *Falcke* v. *Scottish Imperial Insurance Co.* (2)]

E. Beaumont, in reply. I do not claim this money as a payment by the receiver; but I say that the plaintiffs must be treated as having spent this money on necessary repairs, and that they are entitled to be allowed the costs of those repairs in taking the account of what is due to them under their security. The fact that the money was found by the Law Guarantee and Trust Society is immaterial for this purpose; it matters not how the mortgagees obtained the money. In *In re Leslie* (1) Fry J. enumerates four cases in which a lien might be created upon money secured by a policy by payment of premiums, and the fourth is "by reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property." That was a case of a policy, but his observations are of general application. I rely upon the fourth class of cases there mentioned, but I submit that it extends to expenses incurred to make the property more profitable. As regards the question at issue, there is no difference between a mortgagee in possession and a mortgagee out of possession.

(1) (1883) 23 Ch. D. 552, 560. (2) (1886) 34 Ch. D. 234.

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KEKEWICH J. This summons raises a question of considerable difficulty, and all the more so because, so far as I know, it is one of entire novelty. It is a summons issued in a foreclosure action, the plaintiffs being the first mortgagees and the defendants the second mortgagee and the mortgagors. The question is whether in taking the mortgagee's account and ascertaining what is due for the purposes of foreclosure and redemption the cost of certain repairs to the mortgaged premises is to be allowed. What has happened is that there is a receiver who is not in possession but is in receipt of the rents and profits, which, though the same thing for many purposes, is of course an entirely different thing, and it is necessary to consider who that receiver is and what is his office and character. Long before the Legislature intervened to simplify the rights and remedies of mortgagors and mortgagees, it was a very common thing to provide in the mortgage deed that the mortgagee might appoint a receiver, and it was not uncommon, speaking from recollection, to appoint a receiver straightaway by the mortgage deed itself. But, in all these cases, according to my recollection, it was always provided that the receiver should be the agent of the mortgagor. He was, of course, appointed for the security of the mortgagee. He was appointed in order that the money should not go to the mortgagor, who might or might not pay the interest to the mortgagee, but should be stopped in the hands of a third person, who would have to pay the rates and taxes and other outgoings affecting the mortgaged property, but subject to that would be directed to pay the interest to the mortgagee, handing the net balance to the mortgagor. That was the notion of the appointment of a receiver by the consent of the parties either by the mortgage deed or under the mortgage deed. To my mind there can be no question that a receiver appointed in that way could not possibly execute repairs and charge them against the mortgagee. The mortgagee would be entitled to say, in taking the receiver's account, "You have received so much for rent; out of that you must, of course, pay outgoings, but beyond that you can pay nothing without my direction. Subject to the payment of outgoings, the rents

and profits form a net sum applicable in the first instance to keeping down the interest on my security; and what is over and above that belongs to the mortgagor. Out of that you may, if you please, execute any repairs, but you cannot spend a single penny before my interest is discharged, unless you have it in black and white on the face of the mortgage deed, or unless you have my express authority." That was the object and effect of the appointment of a receiver before the Conveyancing Act, 1881. Now that Act in this particular, as in many others, merely adopted the practice of conveyancers and those who were conversant with the particular matter in hand, and this s. 24, to which reference has been made, is really only setting out in a concise and well-considered form, applicable to a great number of cases, that which had been embodied in mortgage after mortgage before that date. Sub-s. 1 provides that the mortgagee shall be entitled to appoint a receiver under the powers in that behalf conferred by the Act, but that he is not to be appointed until certain things happen. Sub-s. 2 provides (as was already provided before) that the receiver shall be deemed to be the agent of the mortgagor, and the mortgagor is to be entirely responsible for his receipts. In other words, if the receiver taking the rents and profits levants leaving the mortgagee in the lurch, the result is that the mortgagor stills remains liable on his covenant, and is bound to pay notwithstanding that his agent unfortunately has received more than sufficient to keep down the interest. Then certain directions are given to him by the Act. He is to have power to receive the rents, and he is to insure any property which the mortgagee directs him to insure, and having paid those particular outgoings he is then, according to sub-s. 8, to apply the money received by him in discharge of the rents, rates, and so on affecting the mortgaged property, and then, if there are any prior charges, he is to keep down all interest on those charges. Then clause iii. of sub-s. 8 provides for the application of the money in payment of, amongst other things, "the cost of executing necessary or proper repairs directed in writing by the mortgagee." As regards repairs, his only authority is that of the mortgagee. The mortgagor cannot give him any

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authority. It would be monstrous if he could, and entirely contrary to the preceding practice. What the receiver has in hand, after making all these payments, is applicable to keeping down the interest of the mortgage. When he has done that the balance belongs to the mortgagor, and the mortgagor may do what he likes with that balance, and may have it applied in repairs or otherwise as he thinks fit. But until the interest is kept down the balance, after paying these outgoings which are provided for, belongs to the mortgagee, and the only discharge which the receiver can get is from the mortgagee. It is to the mortgagee that he must look for his authority, and to the mortgagee that he is accountable.

In this case the receiver has thought fit without any direction from the mortgagee to execute certain repairs. Let me assume that the repairs were desirable, that the premises would not let unless these repairs were executed, and that the money was expended with the greatest possible judgment as well as in good faith in order to secure a good tenant. That may have been a very proper thing for the landowner; but the landowner is not the mortgagor; the landowner for this purpose—that is to say, the person who can give the direction—is the mortgagee, and he is entitled to say if he pleases, "I will have my interest paid, and the repairs shall not be done until that is paid." Then it is said that because the receiver is a gentleman named Ronald, and Mr. Ronald is the manager of a society who have guaranteed the mortgage, therefore he is entitled to do something which any other receiver could not do. Of course the society who have guaranteed this mortgagee are in the position of any other guarantor, and are entitled to enforce their rights by being subrogated to the rights of those whom they protect; but for the moment they are mere strangers. They are not parties to this action, and they are not bound in any way by the account. I am asked to regard this receiver in two capacities as a receiver appointed by the plaintiffs—the agent of the mortgagor with the limited powers which the Act points out—and also as the manager of this society. The only person whom I know in this matter is Mr. Ronald, the receiver appointed under this Act. In that character it seems to me

that he cannot justify any expenditure on repairs unless authorized in writing by the mortgagee, and then only to the extent of the rents and profits, and I direct the account to be taken on that footing.

Mr. Beaumont. There is one further point on which I desire to have your Lordship's ruling. Suppose that it turns out that these repairs were matters of arrangement between Mr. Ronald and the first mortgagees, and that this money was really borrowed by the first mortgagees and expended by them on the repairs, does your Lordship hold that they have no right to charge the money against the second mortgagee?

KEKEWICH J. Yes. I direct the master in taking the account not to allow the first mortgagees any expenditure on repairs except on necessary or proper repairs paid for out of rents and profits on direction in writing by the mortgagees.

Solicitors: *Merriman, White & Thomson; Needham, Tyer & Barrow.*

H. B. H.

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July 23, 24.

In re O'CONNELL. MAWLE *v.* JAGOE.

[1903 O. 836.]

Settlement—Covenant to settle After-acquired Property—Power or Property—Property subject to General Power of Appointment.

A covenant for settlement of after-acquired property extends to property which is limited to such purposes as the covenantor shall appoint, and in default of appointment to him or her absolutely.

A marriage settlement contained a covenant that any property exceeding 200*l.* in value which the wife should become possessed of or entitled to should be brought into settlement. Property, exceeding 200*l.* in value, was subsequently bequeathed in trust for such purposes as she should appoint, and in default of appointment to her absolutely for her separate use. She executed deeds-poll purporting to appoint out of the property several sums of 199*l.* each to herself absolutely:—

Held, that, notwithstanding the general power of appointment, the bequeathed property was bound by the covenant, and the deeds-poll were therefore ineffectual.

Steward v. *Poppleton*, W. N. (1877) 29, followed.

Townshend v. *Harrowby*, (1858) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353, distinguished.

ADJOURNED SUMMONS.

By the marriage settlement of Mr. and Mrs. C. D. O'Connell, dated March 9, 1842, certain real estate was settled upon trust to pay the income thereof to such person or persons as Mrs. O'Connell should by writing appoint, and in default of appointment to pay the same to her for life for her separate use, and after her death in trust for the children of the marriage as she should by will appoint, and in default of appointment for the children as therein mentioned, and certain other real and personal estate was settled upon such trusts as Mrs. O'Connell should from time to time by any deed or instrument in writing limit or appoint.

By a settlement dated December 14, 1881, made in contemplation of the marriage of Anne Sophia O'Connell, one of the several children of Mr. and Mrs. O'Connell, with G. B. Lempriere, it was covenanted, agreed, and declared that if Mrs.

Lempriere or her husband in her right should at one and the same time and from the same source, whether under or by virtue of the trusts and provisions of her father's and mother's settlement of 1842, or any appointment made or executed or to be made or executed under any power or provision therein contained, or from any other source become seised or possessed of or entitled to any real or personal property of the value of 200*l.* or upwards for any estate or interest whatsoever in possession, reversion, remainder, or expectancy, then Mr. and Mrs. Lempriere should assign such property to the trustees upon trust to pay the income to Mrs. Lempriere for her separate use without power of anticipation, and after her death to Mr. Lempriere for his life, and subject thereto in trust for their children, with remainders over.

There were two infant children of Mr. and Mrs. Lempriere.

By her will dated May 7, 1888, Mrs. O'Connell, after making several appointments including a specific appointment of a portion of the property subject to the trusts of the settlement of 1842 upon trust for Mrs. Lempriere, gave and bequeathed all other property belonging to the testatrix at her death unto her executors upon trust for such persons and purposes and in such sums and manner in every respect as Mrs. Lempriere should notwithstanding coverture in writing appoint, and in default of and subject to any such appointment in trust for Mrs. Lempriere for her sole and separate use, it being the intention of the testatrix that Mrs. Lempriere might be able by exercising her power of appointment to defeat the operation of the agreement and declaration contained in the settlement of 1881 for the settlement of her after-acquired property of the value of 200*l.* or upwards. By a codicil to her will dated August 26, 1898, reciting the death of a son, Mrs. O'Connell directed that the trustees of her marriage settlement should hold a sum of 2000*l.* subject to the trusts of that settlement, which by her will she had appointed to that son, upon trust as to one-fourth for such persons and purposes and in such sums and manner in every respect as Mrs. Lempriere should notwithstanding coverture in writing appoint, and in default of and subject to any such appointment in trust for her for her sole and separate use, with

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an expression of intention to the same effect as that contained in the will.

Mrs. O'Connell died on December 2, 1901.

The funds subject to the trusts of the settlement of 1842 were much more than sufficient to pay the 2000*l.*, 500*l.* of which was therefore appointed and given to Mrs. Lempriere. It was also probable that there would be a net residue, exceeding 2000*l.*, of the general estate of the testatrix. The trustees of the marriage settlement of 1842 and of the will and codicil of the testatrix had received notice of four several deeds-poll under the hand of Mrs. Lempriere purporting to exercise the powers given to her by her mother's will and codicil by appointing in her own favour four several sums of 199*l.* each, two out of the 500*l.* and two out of the residue of the testatrix's general estate.

The trustees of Mrs. O'Connell's marriage settlement and will as plaintiffs took out this summons against the trustees of Mrs. Lempriere's settlement and Mr. and Mrs. Lempriere and their children as defendants to obtain the decision of the Court as to whether in their several capacities the plaintiffs ought to pay the four several appointed sums of 199*l.* each to Mrs. Lempriere for her own benefit, or whether they should pay the whole of the 500*l.* legacy and the proper amount of the residue of the testatrix's general estate to the trustees of Mrs. Lempriere's marriage settlement of 1881.

D. D. Robertson, for the plaintiffs, the trustees of Mrs. O'Connell's marriage settlement and will, stated the case.

Christopher James, for the trustees of Mrs. Lempriere's settlement and for the beneficiaries thereunder other than Mrs. Lempriere. In default of appointment Mrs. Lempriere takes absolutely, and she cannot exercise her power of appointment so as to derogate from her contract. In *Bower* v. *Smith* (1), where there was a covenant to settle the wife's after-acquired property of the value of 500*l.* or upwards, and after the marriage 5499*l.* was bequeathed upon such trusts as the wife should appoint, and the wife appointed the fund in

(1) (1871) L. R. 11 Eq. 279; 19 W. R. 399.

her own favour by means of a series of appointments of sums under 500*l.*, it was held that the fund was not bound by the covenant; but it appears by the report of that case in the *Weekly Reporter*, first, that in default of appointment the fund went over to third parties, and, secondly, that the case was not argued. That case, therefore, does not interfere with the present contention. In *Steward* v. *Poppleton* (1), where there was first a bequest in trust for the wife absolutely and then a power of appointment, Jessel M.R. held that the property was bound by a covenant in the wife's marriage settlement to settle her after-acquired property, and observed that the report of *Bower* v. *Smith* (2) in the *Law Reports* omitted to mention that there was a gift over in default of appointment. In *In re Lord Gerard* (3) there was a covenant to settle the wife's after-acquired property of the value of 500*l.*, and then a bequest of a sum of 4000*l.* in trust for such persons as the wife should appoint, and in default of appointment for her separate use. The wife appointed the fund to herself by successive appointments of sums under 500*l.* North J. held that the property was not bound by the covenant, and he distinguished *Steward* v. *Poppleton* (1) on the ground that in that case there was an absolute gift out and out. It is not necessary to distinguish between the several funds in this case, because the interest which the lady takes is in each instance really her absolute property. She has contracted for valuable consideration to settle her after-acquired property, and she cannot be allowed to defeat that contract by the exercise of the power: *Ewart* v. *Ewart* (4); *Attorney-General* v. *Earl of Selborne* (5), per Stirling L.J.

Adams, for Mrs. Lempriere. The authorities shew that a covenant to settle after-acquired property does not extend to compel the covenantor to exercise powers of appointment: *Ewart* v. *Ewart* (4); *Townshend* v. *Harrowby*. (6) This contract relates to property as distinguished from power, and

(1) W. N. (1877) 29.
(2) L. R. 11 Eq. 279; 19 W. R. 399.
(3) (1888) 58 L. T. 800.
(4) (1853) 11 Hare, 276, 286.
(5) [1902] 1 K. B. 388, 398.
(6) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353.

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there is no more reason for holding that Mrs. Lempriere should be compelled not to exercise the power than that she should be compelled to exercise the power for the purpose of giving effect to the covenant. All the property given to her is a defeasible interest. The question is not one of derogation, but of construction. The distinction to be drawn is between power and property, and where the covenant extends to property only and not to powers of appointment, the exercise of such a power takes the property out of the operation of the covenant, unless the appointment so made brings it within it, which it does not do in this case, the amount being less than 200*l.* That was so also in *Bower* v. *Smith* (1), and that case is therefore a clear authority in favour of the validity of the appointments made by Mrs. Lempriere in her own favour. *Bower* v. *Smith* (1) was followed by North J. in *In re Lord Gerard* (2), where, *Steward* v. *Poppleton* (3) being cited, the learned judge held that that case was inconsistent with *Bower* v. *Smith.* (1) It is submitted that no reliance can be placed on the authority of *Steward* v. *Poppleton* (3), which is only reported in the *Weekly Notes*, and was apparently noted there solely for the purpose of correcting the report in *Bower* v. *Smith.* (1) Neither *Ewart* v. *Ewart* (4) nor *Townshend* v. *Harrowby* (5) were cited to Sir George Jessel, and it is difficult to say, without knowing all the facts of the case, what his decision really was. He may have thought that the lady had appointed in such a way that the property came back and was caught by the covenant. The authority governing this case is the decision of Kindersley V.-C. in *Townshend* v. *Harrowby* (5), where there was first a general power of appointment given to the lady, then a life interest to her, and then a gift over to her executors, and the Vice-Chancellor said (6) that she might at any time exercise the power "quite uncontrolled by the covenant in the settlement," and went on to find that if she did not the interest of the executors

(1) L. R. 11 Eq. 279; 19 W. R. 399.
(2) 58 L. T. 800.
(3) W. N. (1877) 29.
(4) 11 Hare, 276, 286.
(5) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353.
(6) 27 L. J. (Ch.) 558.

would be bound, but that the life interest would not be bound, because it was not the purpose or intent of the covenant that income should be converted into capital. That is a clear authority that, notwithstanding the fact that if there is no appointment the property will be bound, yet it may not be so bound where there is an appointment.

KEKEWICH J. The question in this case arises under the will and codicil of Mrs. O'Connell, who died in the possession of property some of which was her own, of which she could dispose by will as owner, while over the rest she had only a power of appointment under her marriage settlement. A daughter of hers, Mrs. Lempriere, was an object of the power, and Mrs. O'Connell was minded to use the power of disposition in favour of the daughter so as to give her a power of appointment and yet to give her also the property. She might have done that in one of three ways: first, which probably would be the best and most straightforward way, she might have given or appointed the property to trustees on such trusts as her daughter should by deed or will appoint, and in default of appointment to the daughter absolutely. Another way would be to give it first to the daughter without the intervention of trustees upon such trusts as the daughter should appoint, and in default of appointment to the daughter absolutely. A third way would be to give it to the daughter absolutely, and then direct that it should be held, with or without the intervention of trustees, upon such trusts as she should appoint, and in default of appointment for her absolutely. These variations are found in many wills, but, to my mind, there is not the slightest difference in principle between them. Whether this testatrix gave it in one way or the other, it is perfectly clear that the daughter could only have a power of appointment in the first instance, and that subject to that she would have it absolutely. Why the power of appointment was inserted in this particular case we know very well. The testatrix was aware that her daughter's settlement contained a covenant for the settlement of after-acquired property, and she desired, if she could, to assist her daughter to evade that

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covenant; she says so, and there is no doubt about it. Ordinarily I think that the power of appointment is given in wills by reference to the form by which it was usual to give a power of appointment before the nature of the gift to the separate use was firmly established, and it still is a convenient way of giving a married woman complete control of her property. It is in general unnecessary, but an adherence to the old form may in some cases have some peculiar advantages. The covenant in Mrs. Lempriere's settlement would cover all that came to her from her mother whether by her mother's will, that is to say by ownership, or under a power of appointment, if it were given to her absolutely, and the only question is whether this property is freed from the operation of that covenant by reason of the power of appointment coming before the absolute interest. The authorities in point are no doubt somewhat conflicting. The point arose, or was supposed to arise, in the case of *Bower* v. *Smith* (1), before Lord Romilly. There the lady, who had bound herself by covenant to settle after-acquired property, had a general power of appointment over certain property, and Lord Romilly held that that was not affected by the covenant in her marriage settlement. The case is imperfectly reported, and has been corrected since, and particularly by Sir George Jessel, who was one of the counsel in the case. The gift over in default of appointment was not to the lady herself, but to a stranger. It was, therefore, impossible to hold that the power of appointment was affected by the covenant to settle after-acquired property, and, the gift over being to a stranger, no question could arise whether the lady was at liberty to exercise her power of appointment. If I may say so, *Bower* v. *Smith* (1) was rightly decided, and does not affect this case. Then comes *Steward* v. *Poppleton* (2), and that seems to me to be a direct decision on the point, though it is to be regretted that it is only reported in the *Weekly Notes*. The facts in that case were almost precisely the same as in this case. There was a bequest by the wife's mother of residuary real and personal estate for conversion, and then a trust of one moiety for the wife absolutely, and the

(1) L. R. 11 Eq. 279; 19 W. R. 399. (2) W. N. (1877) 29.

testatrix declared that the share of the wife "should be for her separate use free from marital control, and should be subject to her appointment by deed or will notwithstanding coverture." She purported to exercise her power of appointment, and the question was whether the exercise of the power took the property out of the covenant. The Master of the Rolls held that the property was bound by the covenant. The decision gains strength from the fact that the Master of the Rolls said that the report of *Bower* v. *Smith* (1), in which he himself was counsel, did not state that the will of the wife's father contained a gift over in default of appointment. Why did the Master of the Rolls mention that? I apprehend he did so in order to distinguish that case, because the gift over there was to a stranger—in other words, he mentions *Bower* v. *Smith* (1), and corrects the report in order to shew that it was not the case with which he was dealing. The next case is *In re Lord Gerard* (2), before North J. With the correction of *Bower* v. *Smith* (1) before him he thought that that case was in conflict with *Steward* v. *Poppleton*. (3) In my judgment there is no conflict at all. On the contrary, *Bower* v. *Smith* (1) seems to me to shew where the covenant does not apply, just as much as *Steward* v. *Poppleton* (3) shews where it does apply. I have read the judgment of North J. more than once, and I cannot understand what he meant. He is reported to have said this: "If in that case the words had been 'to such use as she shall appoint, and subject thereto for her absolutely,' I should have considered it as conflicting with *Bower* v. *Smith*." (1) I cannot follow that at all, because those are words which do not occur in *Bower* v. *Smith*. (1) Then there is one other authority, which is entitled to the greatest respect, namely, *Townshend* v. *Harrowby* (4), decided by Kindersley V.-C. It is reported at considerable length in the *Law Journal*. There the property was given in trust for the lady with a power of appointment in the fullest possible way, and in default of appointment in trust for her for life for her

(1) L. R. 11 Eq. 279; 19 W. R. 399.

(2) 58 L. T. 800.

(3) W. N. (1877) 29.

(4) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353.

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separate use, and subject to that power of appointment and to the life estate, it was given to her executors and administrators, and the Vice-Chancellor broke that up into three parts, and said that she had, first, a power which was not property; secondly, an estate for life which was not bound by the covenant; and, thirdly, an absolute interest which was so bound; and he broke it up in order to shew that they were distinct interests, and that what was true of the absolute interest was not true of the power of appointment because it stood alone, and he dwelt largely on the difference between power and property. As to the life interest which intervened, he held that on the construction of the covenant it did not come within it. That being so, he held that as to the ultimate interest there was no merger or coalescence, and therefore the lady was at liberty to exercise the power of appointment, and so evade the covenant. It seems to me that if *Steward* v. *Poppleton* (1) is sound, *Townshend* v. *Harrowby* (2) was wrongly decided. I cannot see at present that the intervention of the life estate would make any difference. But the Vice-Chancellor saw his way by elaborately breaking it up into three parts. The decision proceeded on those lines, and not on the lines on which I have now to decide this case. I think that, in view of the decision in *Steward* v. *Poppleton* (1), and notwithstanding the case of *Townshend* v. *Harrowby* (2), which unfortunately was not cited to Sir George Jessel or North J., it is my duty to follow *Steward* v. *Poppleton* (1), and hold that this property is bound by the covenant.

Solicitors: *George Slade; Bell, Brodrick & Gray.*

(1) W. N. (1877) 29. (2) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353.

C. C. M. D.

In re SOMERVILLE AND TURNER'S CONTRACT.

KEKEWICH J.

1903

July 28.

[1903 S. 1444.]

Vendor and Purchaser—Copyholds—Equitable Interest—Devolution—Person to convey—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 1, *sub-s.* 4.

In sub-s. 4 of s. 1 of the Land Transfer Act, 1897, providing that the expression "real estate" in Part I. of the Act is not to be deemed to include "land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant," the concluding words apply to land of copyhold tenure as well as customary freehold.

Therefore an equitable estate or interest in copyholds devolves, on the death of the owner, on his personal representative or personal representatives as if it were a chattel real vesting in him or them.

ADJOURNED SUMMONS under the Vendor and Purchaser Act, 1874.

On October 10, 1902, James Edward Somerville entered into a contract with George Turner for the sale to Turner of the equitable estate or interest (being an equity of redemption) of Somerville in certain land of copyhold tenure at Sunderland held of the manor of Houghton, in the county of Durham.

On the investigation of the title it appeared that the equitable estate or interest in question had, previously to March, 1901, become vested in Septimus T. Chatt.

Septimus T. Chatt died on March 17, 1901, intestate, and on June 29, 1901, letters of administration to his estate were granted to Ada Blanche Chatt, his widow, by the Durham District Probate Registry of His Majesty's High Court of Justice.

By an indenture dated November 12, 1901, and made between Ada B. Chatt of the one part and J. E. Somerville of the other part, A. B. Chatt, as personal representative of Septimus T. Chatt, conveyed the land to J. E. Somerville to hold the same unto and to the use of J. E. Somerville, his heirs and assigns, according to the custom of the manor of Houghton, and it was thereby agreed and declared by and between the parties thereto that the person or persons in whom the legal

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estate of inheritance of and in the premises was then vested, his, her, or their heirs, sequels in right and assigns, should thenceforth stand seised thereof according to the custom of the manor of Houghton in trust for J. E. Somerville, his heirs and assigns, for ever.

The purchaser's solicitor objected that by the conveyance of November 12, 1901, Mrs. Ada B. Chatt purported to convey as personal representative of her late husband, and submitted that Mrs. Chatt had no power to sell or convey the property, as no estate vested in her. To this the vendor replied that it was submitted that under the Land Transfer Act, 1897, the estate devolved to her, thus giving her a right to sell.

The present summons was then taken out for the purpose of determining whether the contention of the purchaser or that of the vendor was correct.

Sub-s. 4 of s. 1 of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), is as follows: "The expression 'real estate,' in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant."

It was stated that it was not unusual in the part of the country where the land was situate for the legal estate in copyholds to be kept outstanding, and that this case was, therefore, in the nature of a test case.

Gatey, for the purchaser. The sole question is whether, on the death intestate of the owner of an equitable estate or interest in copyhold land, that estate or interest vests by virtue of s. 1 of the Land Transfer Act, 1897, in his personal representative or, under the general law, in his customary heir. It is submitted that in sub-s. 4 of s. 1 of the Act the concluding words from "in any case, &c.," to the end apply only to the immediate antecedent—that is, to the words "customary freehold," and not to the preceding words "land of copyhold tenure." The result of this construction is that all estates or interests in land of copyhold tenure, whether legal or equitable, are excepted from the operation of Part I. of the Act, and that

therefore an equitable estate or interest in copyholds vests on the death of the owner intestate in his customary heir. That this is so appears clearly from a reference to the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), to which the Act of 1897 is supplemental. By s. 2 of the Act of 1875 it is provided that for the purposes of that Act customary freehold "in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchase" (*sic*) "from the customary tenant" shall not be deemed to be land of freehold tenure. There is no mention there of land of copyhold tenure, but it is plain that the concluding words of sub-s. 4 of s. 1 of the Act of 1897 were substantially taken from s. 2 of the Act of 1875. They ought, therefore, to receive in the later Act the same construction as they must receive in the earlier Act, and be read as applicable to customary freehold only. There are no authorities on the point, but there are some analogies from similar legislation which may be referred to. Where a distinction is intended by the Legislature to be made between legal and equitable interests in point of law, that distinction is clearly drawn in the statute. Thus by the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 1, it is expressly provided that the word "estate" shall extend to an estate in equity as well as at law, and to any interest in, upon, or affecting lands either at law or in equity, and by s. 53 express provision is made as to disposition of equitable estates tail in copyholds by deed. So in the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12, sub-s. 3, it is expressly provided that the section is not to extend to any legal estate or interest in copyhold or customary land; and there are provisions in the Copyhold Acts, 1887 and 1894 (50 & 51 Vict. c. 73, s. 45; 57 & 58 Vict. c. 46, s. 88), to the effect that s. 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), shall not apply to "land of copyhold or customary tenure vested in the tenant on the court rolls of any manor" on trust or by way of mortgage. On principle, where a clear right exists in any person at common law, that right ought not to be taken away by inferential deductions from words which are not clear in themselves. The Court is now asked to introduce a distinction, unknown before, between legal and

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equitable estates in copyholds, and to disturb the rule of descent which has always been the same for both.

Method, for the vendor. The conveyance of November 12, 1901, to the present vendor from the administratrix of the former owner conferred on him a good title to the equitable estate in these copyholds by virtue of Part I. of the Land Transfer Act, 1897. Grammatically construed, the concluding words of sub-s. 4 of s. 1 of the Act of 1897 refer to "land of copyhold tenure" as much as to "customary freehold," and the reason of the thing is in favour of that construction. On the death of a tenant on the court rolls the lord of the manor has a right to require that a new tenant shall come in, and if the legal estate were vested in the personal representative or representatives there might be several persons to come in, and successive admissions of representatives and devisees—a result which would be highly inconvenient. That is the difficulty which s. 1, sub-s. 4, of the Act of 1897 was designed to meet, and it is a difficulty which exists only as between the lord of the manor and the customary tenant, and has no application whatever to equitable ownership. The scheme of Part I. of the Land Transfer Act, 1897, is to vest everything, that can be so vested, in the personal representative or representatives as if it were a chattel real, provided always that there is no difficulty in the way. In the case of an equitable estate in copyholds there is no difficulty in the way, because all that concerns the lord is that he should have a tenant on the court rolls. For this purpose land of copyhold tenure and customary freehold stand on precisely the same footing, and there can be no valid reason why the concluding words of the sub-section should not be read as applying to the one equally with the other. [He referred to Hood and Challis on Conveyancing and Settled Land Acts, 6th ed. p. 106.]

Gatey, in reply. In *Lord Wolverton* v. *Attorney-General* (1) it was held under s. 15 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), providing for the case where a succession has "become vested by alienation or by any title not conferring a new succession," that there was no reason why the expres-

(1) [1898] A. C. 535, 554.

sion "not conferring a new succession" should be extended to "alienation" as well as "title." So in the present case it is submitted that the concluding words in sub-s. 4 of s. 1 of the Act of 1897 ought to be read as applying only to the words immediately preceding them and not to the earlier words, unless there is some strong indication to the contrary (which there is not) to be found in the context.

KEKEWICH J. In this case the vendor accepted a conveyance from an administratrix of property of copyhold tenure, not of the legal estate, but of an equitable estate only; and if the vendor, having so purchased, has obtained a bad title, he cannot force that title on the purchaser. On that two questions arise, both depending entirely on the Land Transfer Act, 1897, and on Part I. of that Act. The object of Part I. of the Act was ex facie to establish a real representative. It was deemed inconvenient that freehold estates in land should vest in the heir whereas leasehold estates in land vested in the personal representative, and it had been for a long time deemed desirable that the two should be placed entirely on the same footing. Accordingly the 1st section of the Land Transfer Act, 1897, provides by sub-s. 1 that "where real estate is vested in any person without a right in any other person to take by survivorship"—that is, in any person for his sole benefit—"it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him." There is no new real representative established, though the Act is for establishing a real representative, but the personal representatives are constituted real representatives, and the Act clearly expresses the intention that the real estate is to follow, for the purpose of vesting in the representative, the law respecting chattels real—in other words, the law respecting leaseholds. The first question is whether that provision applies equally to equitable and legal estates. I see no reason why it should not apply to equitable estates, and to hold that it does not would be to take away a part of the remedy designed by the Act. It is well known to members

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of the legal profession that the title to a large number of estates, including freeholds, is equitable only, as, for example, when an outstanding estate in a mortgagee, or vested in the trustee of an old settlement or will, has been overlooked and never been conveyed. Difficult questions sometimes arise respecting the devolution of the legal estate, and the Court is accustomed to regard an estate in land in the same way whether it is equitable or legal. On a reference to chambers in an ordinary partition action there is an inquiry to ascertain the persons entitled to the real estate, though their interests are equitable only; and, as regards heirship, the devolution of equitable estates is governed by the same rules as that of the legal estate. That is common knowledge, and it is almost impossible to conceive that when the Legislature provided for the real estate being vested in the personal representative in the same way as a chattel real it was intended that equitable estates should not be affected. An executor takes the chattels real of his testator whether equitable or legal, an equity of redemption as much as an original lease. If that is so, I have answered the first question. The vendor bought an equitable estate from a personal representative, and that equitable estate would, if it had been a freehold, in my judgment have vested under the Act in that representative.

But the question here is as to an equitable interest in copyholds, and the argument is that sub-s. 4 of s. 1 of the Land Transfer Act, 1897, takes the equitable estate in copyholds out of the general operation of Part I. of the Act. [His Lordship read the sub-section, and continued:—] It is said on behalf of the purchaser objecting to the title that all land of copyhold tenure is excepted from the expression "real estate" in this part of the Act. That result depends on a reading of sub-s. 4. It is said that the concluding words, that is to say, those following the words "customary freehold," apply to customary freehold only, and that, therefore, all "land of copyhold tenure" is excepted from the expression "real estate." It is quite possible to read the language of the sub-section in this way (though I do not think that is strictly the grammatical construction), if it is necessary to do so in order

to give it a rational interpretation. But I think that it is not necessary. Real estate is not to be deemed to include land of copyhold tenure or customary freehold in any case, &c. Grammatically that means either copyhold tenure or customary freehold in any case, &c.; and unless the words which follow shew on the face of them that they are inapplicable to both they must be extended to both. I see no reason why they should not be extended to both. The words "customary tenant" would seem to refer aptly to customary freehold; but a tenant of copyholds is a tenant according to the custom of the manor, and the expression "customary tenant" is not improperly applied to a custom of that kind. In other respects the phrase used seems to me to be perfectly applicable both to copyholds and customary freeholds. There is very good reason for the exception. Where land descends to the heir according to the custom, it is not convenient to interfere with the relation of lord of manor and tenant. There is a peculiar relation between them, and to introduce the personal representative in that case would be to introduce a novel incident which it would be difficult to attach to the land. Therefore, we find a very good explanation of the restricted meaning of the exception. But it is said that the other interpretation must be sound because this is an Act to amend the Act of 1875, and in the Act of 1875 the same language is used. It is true that in s. 2 of that Act these words occur: "for the purposes of this Act customary freehold, in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchase from the customary tenant, shall not be deemed to be land of freehold tenure." That is very nearly the same language as is used in s. 1, sub-s. 4, of the Act of 1897, but copyholds are not mentioned. There is no such alternative as is found here, and if the expression "copyhold or customary freehold" is introduced the enactment is deprived of application. That being so, and this not being a case in which an admission or any act of the lord is necessary, because the equitable estate may be conveyed without the act of the lord at all, the equitable estate must be deemed to have

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passed to the administratrix from whom the present vendor bought, and his title is therefore good.

Solicitor for vendor: *S. Gissing Skelton, for W. Murray Humphrey, Sunderland.*

Solicitors for purchaser: *J. & R. Gole, for Thorburn Nesbitt, Sunderland.*

C. C. M. D.

BYRNE J. 1903 *July* 9.

In re RILEYS, LIMITED. HARPER *v.* RILEYS.

[1903 R. 294.]

Company—Creditors—Agreement for Composition — Registration — Deeds of Arrangement Act, 1887 (50 & 51 *Vict. c.* 57), *ss.* 4, 5.

The Deeds of Arrangement Act, 1887, does not apply to arrangements made by limited companies.

An agreement was made between a company and some of its creditors, whose names were to be given in a schedule to the agreement, for the payment by instalments, through a trustee, of the debts due to them. A list of these creditors was given to the trustee; several of them signed the schedule, and nearly all assented to it. The agreement was not registered under the Deeds of Arrangement Act, 1887. If all the instalments had been paid the trustee would have received 936*l.*, and the debts of the creditors mentioned in the list amounted to 933*l.* 10*s.* The company paid 216*l.* to the trustee and then made default. The debenture-holders of the company claimed the whole, and the other creditors of the company claimed a share of the 216*l.* The company was not in liquidation:—

Held, that the Act of 1887 did not apply to limited companies, and the agreement was not void for want of registration; that its operation was not confined to the particular creditors who had assented to it; and that all the creditors of the company were entitled to take advantage of it.

ADJOURNED SUMMONS.

The company was registered on October 20, 1900, and on November 21, 1900, a trust deed was executed to secure debentures about to be issued by the company. By this deed the company mortgaged certain leasehold property to and charged the whole of its undertaking and assets, including uncalled capital, in favour of the trustee as a floating charge;

and Mr. Harper was appointed trustee. In May, 1902, the company, being pressed by some of its creditors, asked Mr. Harper to call a meeting and submit a scheme to them, and for this purpose they gave him a list of thirty-five creditors with debts amounting to 933*l.* 10*s.* 4*d.* The meeting was held, and an agreement was executed between the company of the first part, the persons named in the schedule to the agreement of the second part, and Mr. Harper of the third part. By this agreement the company was to pay the creditors the whole of their claims by three equal quarterly instalments, and for this purpose to pay to Mr. Harper a weekly sum of 24*l.* and interest at 5 per cent.; at the end of three months Mr. Harper was to pay over the money to the creditors pro ratâ; all proceedings by the creditors against the company were to be stayed; goods supplied were to be paid for in cash; if the company made default in any weekly payment the agreement was to be at an end and the rights of the creditors were to revert to them.

The company affixed its seal to this agreement and the schedule was signed by eight of the creditors on June 4, 1902. Nearly all the creditors of whom Mr. Harper had notice had since that time signed or assented to the agreement; but the agreement itself had not been registered under the Deeds of Arrangement Act, 1887. In pursuance of the agreement the company paid 216*l.* to Mr. Harper by weekly payments, and on August 11, 1902, it made default, and nothing further had since been paid.

On October 29, 1902, a receiver was appointed in a debenture-holder's action against the company. At the date of the agreement there were many creditors of the company besides those who had notice of the agreement, and the company had been insolvent when it was executed. These additional debts now amounted to about 2500*l.* It was stated that the receiver had disposed of the business, but that the company was not being wound up; so no question of fraudulent preference arose.

This summons was taken out to determine whether the 216*l.* belonged to the creditors who had signed or assented to the agreement, to all the creditors including those who had not

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signed or assented to it, or to the debenture-holders. It was agreed that, although the company had made default, the agreement had not thereupon come to an end for the purpose of determining the destination of the money received under it.

Whinney, for a creditor who had assented to the agreement, and for Mr. Harper. Mr. Harper received the 216*l.* as agent for the creditors who signed or assented to the agreement, and the money belongs to them. That that was the intention is shewn by the fact that the amount of the instalments if paid in full would be almost exactly the same as the total debts of those creditors. The agreement is not void for want of registration. The Deeds of Arrangement Act, 1887, does not apply to deeds executed by limited companies. It is a graft on the bankruptcy law and has nothing to do with companies. They are otherwise provided for by ss. 136, 159, and 164 of the Companies Act, 1862, and the Joint Stock Companies Arrangement Act, 1870. The language of the Act of 1887 in ss. 4, 6, 7, 9, 13, 16, 19, and of the rules made under the Act, shews that it does not affect companies. There is no decision precisely on this point, but it has been held that the Bills of Sale Acts do not apply to companies: *In re Standard Manufacturing Co.* (1) Secondly, this agreement is not within the Act of 1887, for it is not "for the benefit of his creditors generally." The meaning of the word "generally" is explained with reference to s. 4, sub-s. 1, of the Bankruptcy Act, 1883, in *Ex parte Barton.* (2)

A. Whitaker, for the debenture-holders. The agreement is a deed of arrangement within the Act of 1887, and is void for want of registration. That the word "debtor" includes a limited company is shewn by the rules made under the Act, which say that a "debtor" means a "person" who makes an arrangement, read with the Act which says that a "person" includes a body corporate. No doubt other persons besides companies are included in the Act, and therefore the language has to be wide, and some of the words do not apply to companies; but that is no reason why it should not apply to

(1) [1891] 1 Ch. 627. (2) [1900] 2 Q. B. 329.

companies at all. This company has been obtaining credit which it would not have had if these creditors had taken proceedings against it: that is precisely the mischief aimed at by the Act. A company cannot make a deed of arrangement except under this Act, and it is desirable that the Act, which is not inconsistent with the Companies Acts, should apply to companies.

The agreement was for the benefit of the creditors generally. The schedule was made to be signed by all who wished to sign it, and was not confined to a class of creditors: *General Furnishing and Upholstery Co.* v. *Venn* (1), which was followed in *Boldero* v. *London and Westminster Loan and Discount Co.* (2) It is a question of intention. Mr. Harper did not know there were any other creditors, and he did not mean to exclude them. If the deed is void the 216*l.* belongs to the debenture-holders, and Mr. Harper is a trustee for them: *Latter* v. *White.* (3) If the deed is not void the debenture-holders can claim to share with the other creditors; but the amount is very small, and we prefer to repudiate the deed altogether.

J. G. Wood, for creditors who were not included in the list given to Mr. Harper. All the creditors ought to have an opportunity of signing the agreement and be allowed to share in the 216*l.* The Act does not apply to companies, and the agreement was for the benefit of the creditors generally. We adopt the arguments which have been already advanced in favour of those propositions.

Whinney, in reply.

BYRNE J. stated the facts, and proceeded:—The first question is whether the agreement is void for want of registration under the Act of 1887; and that turns on whether or not the Act applies to deeds executed by limited companies. The Deeds of Arrangement Act, 1887, belongs to a line of legislation having reference to the bankruptcy laws. After the passing of the Bankruptcy Act, 1883, which repealed the

(1) (1863) 2 H. & C. 153. (2) (1879) 5 Ex. D. 47.
(3) (1872) L. R. 5 H. L. 578.

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sections of the Bankruptcy Act, 1869, with reference to composition deeds, except in certain specified cases, statutory compositions were no longer employed; and in that state of circumstances a practice became prevalent of executing composition deeds outside the jurisdiction of the Court; and a great deal of winding up of bankrupt estates was carried on through private hands without any interference from the legal authorities. Then in 1887 a new Deeds of Arrangement Act was passed in order to remedy this state of things. Prior to this the Companies Act of 1862 had already contained provisions as to deeds of arrangement by companies. By s. 164 it was enacted that "any conveyance or assignment made by any company formed under this Act of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents." When one examines the Act of 1887 one cannot fail to be impressed with this—that the various expressions used seem to be referable to arrangements by individuals rather than by limited companies. The definition clause (s. 4, sub-s. 2) provides that a deed of arrangement shall include instruments made by "a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy)," and "cases where creditors of a debtor obtain any control over his property or business" are also provided for. Sect. 5 avoids unregistered deeds of arrangement. Sect. 6 prescribes the mode of registration; it directs that a true copy of the deed shall be filed with the registrar in like manner as a bill of sale, "together with an affidavit verifying the time of execution, and containing a description of the residence and occupation of the debtor, and of the place or places where his business is carried on, and an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors." The residence and occupation of the debtor have to be described, and an affidavit must be filed by him; and none of these things appear to be applicable to limited companies. By s. 7 the registrar is to keep a register wherein shall be entered "(*b*) the name, address, and descrip-

tion of the debtor, and the place or places where his business is carried on, and the title of the firm or firms under which the debtor carries on business, and the name and address of the trustee (if any) under the deed," and "(*e*) the amount of property and liabilities included under the deed as estimated by the debtor." By s. 8 the registrar of bills of sale is to be the registrar for the purposes of this Act. Sect. 9 speaks of the "name, residence, and description of any person"—words which would include those of the debtor. Sect. 16 is as follows: "The 3rd sub-section, paragraph (*g*), of the 28th section of the Bankruptcy Act, 1883, which enacts amongst other things that one of the facts on proof of which the Court shall either refuse an order of discharge to a bankrupt, or suspend the operation of the order for a specified time, or grant the bankrupt an order of discharge subject to the conditions mentioned in the section, is that the bankrupt has on any previous occasion made a statutory composition or arrangement with his creditors, shall be read and construed with the word statutory omitted therefrom." That section shews that deeds executed under the Act of 1887 are considered to be within the scope of s. 28 of the Bankruptcy Act, 1883. Then s. 17 says that nothing in the Act is to affect the provisions of the law of bankruptcy; and s. 18 gives power to make rules. The interpretation section of the Act contains no definition of the word "debtor"; but it defines "person" as including a "body of persons corporate or unincorporate." In the interpretation clause of the rules I find "debtor" defined as "any person by, for, or in respect of whose affairs a deed of arrangement, as defined by the Act, shall be made or entered into, and includes a firm of persons in co-partnership." Sub-clause 3 provides that "any terms and expressions defined by the Act shall in these rules have the meanings assigned to them by the Act." Mr. Whitaker says that I must look back to the Act to find out what "person" means; that I shall there find that it means a body of persons corporate or unincorporate; that that definition includes a company; and, therefore, that by the rules "debtor" includes a company. That is his strongest point; but I do not think it is sufficient to do away with the inferences I have already

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referred to. Further, the forms given in the appendix to the rules cannot apply to companies; and by rule 10, "The county court registrar shall keep an index, alphabetically arranged, in which he shall enter, under the first letter of the surname of the debtor, such surname, with his Christian name, address, and description." There is another clause of the Act which I should refer to, namely, s. 13, by which, where the place of business of the debtor is situate outside the London bankruptcy district, the registrar is to transmit a copy of the deed to the registrar of the county court in the district where the place of business is situate, with an affidavit in the form given in the appendix to the rules; and that again is not suitable to companies. From first to last, looking at these provisions, and bearing in mind that there have been two lines of legislation, one dealing with bankruptcy and the other with companies, and the facts which led to the passing of the Act of 1887, all tending to shew that the arrangements dealt with by that Act were deeds executed by those who under the old Act of 1869 came under the bankruptcy law, I am led to the conclusion that the Act of 1887 was not intended to and does not apply to deeds of arrangement by limited companies.

Coming then to the agreement itself: so far as the debenture-holders are concerned, it was contended that the deed was invalid, and their claim to come in under it was not insisted on. There is the body of creditors whose names were given to Mr. Harper, and also the outside creditors who claim to take advantage of the agreement. The argument on behalf of the latter was put in this way. It was said that a deed or agreement in this form was meant or adapted to include all creditors who desired to take the benefit of it, and was not confined to those whose names appeared in the schedule to the agreement as having assented to it. One of the arguments addressed to me with the object of restricting the effect of the agreement as much as possible was this—that if the company paid up their instalments of 24*l.* a week for three-quarters of a year, the sum produced would just about equal the amount required to pay off the creditors whose names were given to Mr. Harper; but to my mind that is only an argument against confining the

scope of the deed to such of the creditors whose names were so given as were actually named in the schedule. *General Furnishing and Upholstery Co.* v. *Venn* (1) was cited, in which there was a deed-poll by which the creditors whose names and seals were thereunto subscribed and set agreed to accept a composition from their debtor, and it was held to be for the benefit of all those willing to accept the composition. I cannot see any substantial distinction between the frame of the document in that case and the agreement now in question for the purpose of considering whether its benefit should be confined to those who signed it and not be extended to all who choose to come in under it. In my opinion, therefore, all the creditors who like to take advantage of the deed are entitled to share in the 216*l.*

Solicitors: *Lumley & Lumley; J. Arscott Bartrum; Guscotte & Fowler.*

(1) 2 H. & C. 153.

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June 11, 12, 13, 20.

ATTORNEY-GENERAL *v.* TRUSTEES OF THE BRITISH MUSEUM.

[1901 A. 1907.]

Crown—Jura Regalia—Treasure Trove—Celtic Gold Ornaments—Alleged præ-Christian Votive Offerings—Royal Charter—Grant of Lands to Subjects—Construction—General Words—"Franchises"—Title of Crown—Jus Tertii.

Where gold or silver articles whose owner is unknown are found buried and lying all together in one place, the presumption is that they were intentionally hidden for the benefit of the depositor, and they are therefore treasure trove.

Treasure trove, being one of the jura regalia which belong to the King by virtue of his prerogative, cannot be claimed under a general grant of franchises in a royal charter, but must itself be expressly granted; although, when so granted, it becomes a franchise in the grantee.

The rule of construction applicable to grants from the Crown to a subject discussed.

Quære, whether in all claims to property, either real or personal, by the Crown, the defendant can defeat the claim of the Crown only by shewing a better title in himself, or whether he can do so by shewing a better title in some one else.

THIS was an information brought to establish the title of the Crown to certain articles which were found on a farm at Broighter, on Lough Foyle, in the north of Ireland, on the ground that they were treasure trove, under these circumstances.

In the year 1896 two ploughmen were driving a furrow in a field near Lough Foyle, the leader with a 6-inch plough, the second, Nichol, following down the same furrow with a 14-inch American plough. Nichol's plough struck something hard at the bottom of the furrow, and he stopped and went back and found certain gold articles all lying together in a space about nine inches square. The articles found consisted of the following: (1.) A hollow collar with repoussé ornaments; (2.) a model boat with thwarts, and a number of oars, spars, &c.; (3.) a bowl with four small rings at the edges; (4.) a solid gold torque; (5.) one half of a similar torque; (6.) a necklace consisting of three plaited chains with fastenings; (7.) a single chain. The two last were found inside the hollow

collar. The oars were much bent, and were inside the bowl, which was flattened. The boat was crumpled up. Nichol took the articles to his master, and they were sent to the factory of Messrs. Johnson, in Grafton Street, Dublin, who restored them to their original shape. The articles were of great antiquity and beauty, and of Celtic origin. The dates suggested for their manufacture ranged from 300 B.C. to 600 or 700 A.D., and the Court held that they might fairly be attributed to the second or third century after Christ. They were acquired by Mr. Day, an antiquary, and in January, 1897, were exhibited at a meeting of the Society of Antiquaries of London. They were pronounced by some scientists and archæologists to be a votive offering to some marine deity. Subsequently they were purchased in good faith by the defendants on behalf of the British Museum. They were now claimed by the Crown as above. The statement of claim alleged that the articles had been discovered concealed in the earth, that the owner of them at the time of their being concealed was unknown, and that under the circumstances they were treasure trove and belonged to the King by virtue of his Royal prerogative. The defendants by their defence did not admit that the articles were originally concealed, or that they were treasure trove. They also alleged that by charters of James I. and Charles II. large tracts of land and the towns of Derry and Coleraine and other hereditaments in the north of Ireland were granted to the Irish Society with all such franchises as the Crown could grant, and in such terms as to include treasure trove; and that the Irish Society for valuable consideration had granted part of these lands to the Fishmongers' Company.

The two charters were substantially in the same terms, and it is therefore only necessary to refer to that of Charles II. By this charter, after reciting that James I. by the first charter had constituted the Irish Society and had granted to them the towns of Derry and Coleraine and divers other towns and hereditaments, royalties, franchises, privileges, and immunities; and reciting that the Irish Society had granted parts of such lands and hereditaments to the Fishmongers' Company and other companies; and reciting that the said charter had been

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cancelled in the Court of Chancery; and reciting that Charles I. had declared his Royal will for restoring to the Irish Society and the said companies all the lands, royalties, and privileges in the said charter mentioned to the intent that the Irish Society and the other companies might be restored to all towns, territories, lands, royalties, franchises, privileges, and immunities vested in them by force of the said charter of James I. as if no repeal of such charter had ever been made; King Charles II., of his "special grace, certain knowledge, and mere motion," constituted the townships of Londonderry and Coleraine. Then followed a clause incorporating the Irish Society; then followed a grant to the Irish Society of the towns of Londonderry and Coleraine and of the abbey of Coleraine, "and the whole water, bay, river, stream, or rivulet of Lough Foyle within the limits aforesaid and the whole ground or soil thereof, and also the whole piscary, fishing and taking of fishes, as well salmon and eels as all other kind of fishes whatsoever of, in, or within the water, bay, creek, or river of Lough Foyle." Then followed the general words: "all and singular our messuages, mills, houses . . . . fisheries, suits, mulctures, warrens, mines, quarries, rents, revenues, services, ... escheats, reliefs, fines, amerciaments, courts leet, courts of view of frankpledge, perquisites, and profits of courts leet, waived chattels, estrays, fairs, markets, tolls, customs, rights, jurisdictions, franchises, liberties, privileges, profits, commodities, advantages, emoluments, and hereditaments whatsoever, with all their appurtenances, of what kind or nature soever they be, or by whatsoever names they are known, reputed, taken, or called, situate, lying, and being, growing, running, renewing, increasing, emerging, or arising within the counties, territories, limits, compass, and circuit aforesaid." Then followed a grant of "courts leet, view of frankpledge, law days, courts baron, hundred courts, county courts, courts of survey, and other courts of assize, and assay of bread, wine, and ale, waived chattels, goods confiscated, estrays, chattels of felons and fugitives, felons of themselves and of those put in exigent, deodands, knights' fees, escheats, reliefs, heriots, free warrens, and all other rights, jurisdictions, liberties, franchises,

customs, privileges, profits, commodities, advantages, emoluments, and hereditaments whatsoever . . . . to the same premises or any of them belonging or appertaining . . . . and as fully, freely, and wholly and in as ample manner and form as we or any of our progenitors or ancestors late Kings and Queens of England and Ireland . . . . have had, used, or enjoyed, or might or ought to have had and enjoyed." Then followed certain exceptions. Then followed a grant to the Irish Society of the office of vice-admiralty on all the coasts or shores at Coleraine and Londonderry, "together with all and singular royalties, rights, liberties, privileges, profits, and pre-eminences to the same office in anywise belonging or appertaining, incident, or appendent." Then followed a grant of "all wrecks of the sea . . . . and also flotsam and jetsam in the places and shores aforesaid."

It was agreed that the articles were discovered in that part of the lands comprised in the charters which was conveyed by the Irish Society to the Fishmongers' Company, and that the place where they were found was on the raised beach by Lough Foyle, which at one time had been submerged. Evidence was given by geologists as to the time when the raised beach was formed, and by scientists and archæologists as to the articles being a votive deposit to some marine deity. This evidence is sufficiently noticed in the arguments and judgments.

Sir R. B. Finlay, A.-G., Sir E. H. Carson, S.-G., H. Sutton, and *R. J. Parker,* for the Crown. The fact that all these articles were found packed together in a small space about nine inches square and some fifteen or eighteen inches below the surface of the soil demonstrates that they were placed there by some one for concealment or security, and brings them within the definition of treasure trove in Coke, 3rd Inst. p. 132: "Treasure trove is when any gold or silver, in coin, plate or bullion, hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property, it doth belong to the King, or to some lord or other by the King's grant, or prescription. The reason wherefore it belongeth to the King, is a rule of the common law, That such goods whereof no

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man can claim property, belong to the King, as wrecks, strays, &c., 'Quod non capit Christus, capit fiscus.' It is anciently called 'fyndaringa,' of finding the treasure." It is suggested on behalf of the defendants that the articles were deposited as a votive offering to some heathen deity. But even if they were, being hid in the ground they would be treasure trove until the person who placed them there or his legal representative claimed them. As to the plea that the effect of the charter of Charles II. was to confer on the Irish Society and their assigns the right to treasure trove, we contend, first, that on the general construction of the charter it did not pass under the general words. Treasure trove is one of the "jura regalia," or flowers of the Crown, as Coke puts it. It is not a franchise as long as it remains in the Crown, but when granted to a subject it becomes a franchise in the grantee, and being a "jus regale" it requires express words to pass it. If this charter were a grant between subject and subject, it is submitted that treasure trove would not pass under the general words "franchises" nor under the word "royalties" which occurs only in the grant of the office of vice-admiral: a fortiori it does not pass under general words in a grant from the Crown to a subject, for the rule of construction is that the King's grant is taken most strongly against the grantee and most favourably to the King: Chitty on Prerogatives, pp. 50, 51, 391, 392; Plowden, pp. 243, 336, 337; Comyns' Dig. tit. "Grant," G. 7; *Fishery of the Banne Case* (1); *Rex.* v. *Capper* (2); *Abbot of Strata Mercella Case* (3); *Attorney-General* v. *Marquis of Downshire* (4); *Heddy* v. *Wheelhouse* (5); *Duke of Northumberland* v. *Houghton* (6); and the express grant by the charter of the franchise of wreck, which is one of the "jura regalia," is also against the presumption that treasure trove was intended to pass. Next, in the case of treasure trove, no subject can dispute the right of the Crown except by shewing title in himself, or in some one through whom he claims, and it is not necessary—as in the case of land—to shew the

(1) (1610) Davies, ed. 1762, pp. 149, 156.
(2) (1817) 5 Price, 217, 249; 19 R. R. 568.
(3) (1590) 9 Rep. 25 b.
(4) (1816) 5 Price, 269; 19 R. R. 603.
(5) (1597) Cro. Eliz. 591.
(6) (1870) L. R. 5 Ex. 127.

title of the Crown by office found: *Dunwich Corporation* v. *Sterry* (1); *Reg.* v. *Toole* (2); Chitty on Prerogatives, pp. 259, 358; Stanford on Prerogatives, pp. 55, 56; *Attorney-General* v. *Moore*. (3) Here it is not open to the defendants to set up the title of the Irish Society and Fishmongers' Company when they do not claim under those corporations.

Warmington, K.C., for the defendants. The Fishmongers' Company have made over to us whatever interest they have in these articles. Our pleading is to shew that the Crown are not entitled. If it is necessary to amend by adding parties, we ask to amend now.

The Attorney-General. The application to amend comes a great deal too late. We ask the Court to deal with the case as it stands. If either of the corporations have any title to these articles, they can afterwards present a petition of right.

FARWELL J. I think I can do justice to all parties if I deal with the case on the pleadings as they stand without any amendment. If I decide in favour of the Crown, it will still be open to the Irish Society or Fishmongers' Company to apply by petition of right, and, if they succeed, to hand over the articles to the British Museum.

The Attorney-General. Our contention is that the right is in the Crown where no office is necessary to the same extent as it is in the Crown where an office is necessary and has been found; and where there is an assertion of title in the Crown, as against the Crown the subject must prove a title in himself, and cannot set up a mere title of a third person under whom he does not claim: Chitty on Prerogatives, pp. 332–3; Coke, 4th Inst. p. 116; Comyns' Dig. tit. "Prerogative," D. 74, 85; Manning on Exch. Pr., 2nd ed. p. 185. There is no case in the books in which the title of some third person, the jus tertii, has been set up except in an old case of *Reg.* v. *Mason* (4), and the decision, so far as it goes, is an authority for the Crown.

(1) (1831) 1 B. & Ad. 831; 35 R. R. 471.
(2) (1867) 11 Cox C. C. 75; Ir. R. 2 C. L. 36.
(3) [1893] 1 Ch. 676.
(4) (1702) 2 Salk. 447; 7 Mod. 32, n.

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[FARWELL J. Is it necessary, in order to establish treasure trove, that the Crown should shew that it has been actually concealed?]

The Attorney-General. Our submission is, that if the things are found together in such a way as to indicate they were put there, the "depositio pecuniæ et depositio thesauri" is inferred, and if they be gold or silver they vest in the Crown as treasure trove, and the onus is on the defendants to displace that inference.

Warmington, K.C., Haldane, K.C., and *E. Beaumont*, for the defendants. The definition of treasure trove is placed a little too high on behalf of the Crown. Blackstone says (1): "Treasure trove, called in Latin thesaurus inventus, which is where any money or coin, gold, silver, plate, or bullion, is found hidden *in* the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the King: but if he that hid it be known, or afterwards found out, the owner and not the King, is entitled to it. Also if it be found in the sea, or *upon* the earth, it doth not belong to the King, but the finder, if no owner appears. So that it seems it is the *hiding*, not the *abandoning* of it, that gives the King a property: Bracton defining it, in the words of the civilians, to be 'vetus depositio pecuniæ.' This difference clearly arises from the different intentions, which the law implies in the owner. A man, that hides his treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again, when he sees occasion; and, if he dies and the secret also dies with him, the law gives it to the King, in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it to the common stock, without any intention of reclaiming it; and therefore it belongs, as in a state of nature, to the first occupant, or finder; unless the owner appear and assert his right"; and the definition in Stephen's Commentaries, 11th ed. vol. ii. p. 555, and in Chitty on Prerogatives, p. 152, is much to the same effect. Our submission is that this is not a case of hiding at all, or of abandonment in that sense, but it is the case of

(1) 1 Bl. Com. p. 285.

a votive offering deposited about the first century of the Christian era in honour of a marine deity whom the depositor wished to propitiate. It is in evidence that the raised beach was at one time covered with water, and a little before the Christian era was formed by a great upheaval of the land, and we submit that in accordance with what is accepted as the known custom of the ancients of depositing votive offerings to marine deities, these articles were deposited in Lough Foyle, and then by the upheaval of the raised beach were found in the place where they had been deposited; and in the case of votive offerings, the objects were often mutilated or battered to release the spirit, as is the case here.

[FARWELL J. I should like to know whether there was in fact any sea god known to the ancient Irish to whom votive offerings were ever known to have been made, and whether there were any Irish kings who had religion of a nature that would cause them to make votive offerings.]

L. Horton-Smith, as amicus curiæ, referred the Court to the late Mr. R. R. Brash's "Ogam Inscribed Monuments of the Gaedhil in the British Islands" (published 1879)—a work dealing in the main with a series of monuments, one of which was discovered in the north of Ireland not far south of Lough Foyle itself—as shewing (p. 22) the existence, at any rate amongst the præ-Christian Irish, of a water deity known as Mananan Mac Lir, answering to the Latin Neptune, the god of the sea (for whom he referred also to pp. 17, 210, 380, 419, 420).

Warmington, K.C. Under the circumstances there can be no evidence of the actual deposit. The evidence is of a finding of these articles all together in the earth. It is clear that articles may find their way into the ground in various ways; and the presumption of treasure trove only arises when the inference is that the articles have been intentionally hidden for the benefit of the depositor, but that presumption does not arise when the inference is that the deposit has been made for the purpose of making a votive offering, which excludes the animus recuperandi. Here the evidence fails to prove the element of hiding, which is essential to treasure trove, and raises the inference of a votive deposit, which is as plausible as the inference which the Crown seeks to raise. In the next

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place, if these articles are treasure trove, the right to treasure trove passed under the Royal grants. The old authorities go too far. It is not a hard and fast rule that all Royal grants are to be construed in favour of the King, especially if the grant shews that it was not made at the solicitation of the grantee, but "ex speciali gratia, certa scientia, et mero motu regis," which is the case here: Chitty on Prerogatives, p. 392. The passage in Plowden is a dictum, and the statement in Comyns' Dig. tit. "Grant," G. 7, was much discussed in *Jewison* v. *Dyson* (1), and the later authorities shew that in grants from the Crown no more is to be inferred than would be inferred from the same language if used by a subject: *Dyke* v. *Walford*. (2) A franchise is a Royal privilege or branch of the King's prerogative: Cruise's Digest, 4th ed. vol. iii. p. 244; and treasure trove when granted to a subject is properly described as a franchise. As between subject and subject "franchise" is not an ordinary general word at all, and when you find it in such a charter as this, with other general words such as "waived chattels and estrays," which are jura regalia, we submit it includes treasure trove, and that the same argument applies to the general word "royalties," though used in connection with the grant of vice-admiralty: *Dyke* v. *Walford* (2); *Attorney-General of Ontario* v. *Mercer* (3); *Attorney-General* v. *Moore*. (4) We also particularly rely on the grant of general words by a separate testatum in the charter. Lastly, as to the jus tertii. It does not matter who the tertius is, and, if the grant to the Irish Society does not pass treasure trove, of course they could not regrant it to the Fishmongers' Company. It is sufficient for us to set up the grant to the Irish Society. No authority can be produced to the effect that, where the Crown is seeking to enforce a Royal right to chattels, it is not competent for the person who is made defendant to allege that prior to the action such Royal right had been granted away. We agree that the cases of *Dunwich Corporation* v. *Sterry* (5) and *Reg.* v. *Toole* (6) shew that it is not necessary in a case of wreck or treasure trove to institute proceedings to have office

(1) (1842) 9 M. & W. 540.
(2) (1846) 5 Moo. P. C. 434, 479.
(3) (1883) 8 App. Cas. 767, 778.
(4) [1893] 1 Ch. 676.
(5) 1 B. & Ad. 831; 35 R. R. 471.
(6) 11 Cox C. C. 75; Ir. R. 2 C. L. 36.

found. The other authorities cited for the Crown are, we submit, peculiar to cases concerning the right to land in which the title of the Crown had been as to the land already found. There are prerogative rights with regard to procedure which are stated in Chitty on Prerogatives, p. 245, but the general rule is that the King may waive his prerogative remedies and adopt such as are assigned to his subjects. This action is nothing more than an action of trover or detinue for the recovery of chattels, and we submit that the authorities cited do not shew that in an action such as this the defendant is precluded from pleading that, prior to the finding of the chattels, the Crown had parted with its right.

The Attorney-General, in reply. As to treasure trove, the evidence is irresistible that these articles were intentionally concealed where they were found. The defendants' evidence of the deposit being a votive offering is very vague, and this is the first time it has been suggested that a votive offering of this nature took place in Ireland. The passage in Blackstone on which the defendants rely does not assist them. The point of the passage is this. If a man abandons his property, his intention is to be taken to be that the first finder may have it. If he has hidden it away, there is no such intention. Now in the case of treasure deposited as a votive offering or put in a grave, it is submitted that it is impossible to impute any such intention. There is no intention of abandonment. There is the intention that it shall be an offering to the deity, but it is not deposited in order that the first finder may have it. The owner intends that the deity shall have the offering, or that it shall be there as a token of respect to the remains of the deceased, but subject to that the owner would assert his property to the thing. There is nothing from which the intention can be inferred that it shall be the property of the first finder. When such a case arises it would, it is submitted, undoubtedly be held to be treasure trove, because it is treasure which has been concealed. Then as to the construction of the charter, the general words "franchises, liberties, privileges, &c.," only give any franchise that was already in existence and appendant to the land. The various kinds of franchises are enumerated and examined in Chitty on Prerogatives, p. 119.

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The right of treasure trove is not appendant to the land, and can only pass by express grant. The true rule for the construction of franchises is laid down in Coke, 2 Inst. p. 282; Comyns' Dig., tit. "Franchises," A. 1, and tit. "Grant," G. In *Dyke* v. *Walford* (1) the grant expressly mentioned "jura regalia." As to the jus tertii, the form of the proceedings really makes no difference whatever with regard to the rights of the Crown, and the Crown can choose its own Court: *Attorney-General* v. *Wilson*. (2) The principle is, that when the Crown claims property either in land or personalty from a subject, the information lays the title of the Crown, and the subject must assert a title in himself as against the Crown. There is no direct authority, but the passages in Chitty on Prerogatives, pp. 332, 333, 358, support the proposition.

P. J. Henriques held a watching brief for the Irish Society.

Cur. adv. vult.

June 20. FARWELL J., after stating the circumstances under which the articles had been discovered, and their subsequent purchase by the defendants, continued:—The trustees set up two defences—first, they deny that the articles are treasure trove; and, secondly, if they are, they allege that by a charter of Charles II. the right to treasure trove is vested, not in the Crown or themselves, but in the Irish Society.

Several definitions of treasure trove have been cited to me, not substantially differing one from another. I will take that cited in Chitty on Prerogatives, p. 152: "Treasure trove, is where any gold or silver in coin, plate, or bullion, is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the King or his grantee, having the franchise of treasure trove; but if he that laid it be known or afterwards discovered, the owner and not the King is entitled to it; this prerogative right only applying in the absence of an owner to claim the property. If the owner, instead of hiding the treasure, casually lost it, or purposely parted with it, in such a manner that it is evident he intended to abandon the property altogether, and did not purpose to resume it on another occasion, as if he

(1) 5 Moo. P. C. 434, 479. (2) (1900) 70 L. J. (Ch.) 234.

threw it on the ground, or other public place, or in the sea, the first finder is entitled to the property, as against every one but the owner, and the King's prerogative does not in this respect obtain. So that it is the hiding, and not the abandonment, of the property that entitles the King to it." It is clear from the very terms of the definition that no direct evidence can be given of the intention to hide, or the intention to abandon, by a person who is ex hypothesi unknown. The direct evidence must necessarily be confined to the discovery of articles in fact concealed, and the Court must presume the intention to hide or to abandon from the relevant surrounding circumstances, and the motives that usually influence persons acting under such circumstances, according to the ordinary dictates of human nature. In the present case the articles were obviously of considerable value, but of a miscellaneous nature, such as might well represent the store of a native chief or the spoils gathered in the raid of some Norse pirate. The articles were all put close together, the chains being actually concealed within the hollow of the collar in the mode which a person hiding them for safety with a view of returning to reclaim them would be likely to adopt. Their value renders it improbable that they would be abandoned except under stress of imminent danger, and the care with which the chains were put inside the collar and all the articles were collected together point to the absence of any such imminent danger as would necessitate abandonment. The inference, therefore, is that they were intentionally concealed for the purpose of security. There is no evidence at all as to the date of concealment, but the state of Ulster from the beginning of its history down to comparatively modern times has been such as to render it highly probable that treasure would have been concealed on many occasions, and in this very district there is record of a great invasion of Norsemen, who overran the land comprising this spot about the year 850 A.D. The inference, therefore, appears irresistible that this was vetus depositio unless the defendants can displace it. Mr. Warmington argued that it would be enough for him to shew any other plausible theory. I do not agree with him. The Crown must first prove a primâ facie case, but when they have done so the defendants

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must defeat that title by producing a better title. But, in my opinion, the defendants' theory is not even plausible. I desire to speak with all respect of the gentlemen who have been called as witnesses for the defence, but I must express my opinion that the Court has been occupied for a considerable time in listening to fanciful suggestions more suited to the poem of a Celtic bard than the prose of an English law reporter. The defendants' suggestion is that the articles were thrown into the sea, which, they suggest, then covered the spot in question, as a votive offering by some Irish sea king or chief to some Irish sea god at some period between 300 B.C. and 700 A.D.; and for this purpose they ask the Court to infer the existence of the sea on the spot in question, the existence of an Irish sea god, the existence of a custom to make votive offerings in Ireland during the period suggested, and the existence of kings or chiefs who would be likely to make such votive offerings. The whole of their evidence on these points (if I may so describe it) is of the vaguest description, and I find as follows: (1.) There is no evidence to shew that the sea ever flowed over the spot in question within any period during which the articles could have been in existence; it is not disputed that the raised beach on which the spot is situate is of later origin by upheaval than the surrounding land, but there is nothing to shew that it was raised at any time since the Iron Age began; and so far as I can see it may have been at any time between 2000 or so B.C. and some time before the beginning of the Christian era. (2.) There is nothing to shew that votive offerings of the sort suggested were ever made in Ireland. There is no such consensus of expert opinion as would enable me to find that such offerings have ever been made in Europe since the Bronze Age. There is no case known of a votive offering anywhere of a ship coupled with other miscellaneous articles, and there is no case on record of any votive offering having ever been made in Ireland at any time. (3.) Notwithstanding the passage in Brash, it is by no means certain that there was any Irish sea god at all. (4.) Or that there were any Irish sea kings or chiefs who made offerings to a sea god, if any such god there were. Further, the negative inferences against the defendants' theory are of

considerable weight. Votive offerings to a pagan deity would be offered in such a way as to make the most display; no one seeking to propitiate an anthropomorphic deity, who like Baal might be engaged in hunting or sleeping, would be likely to conceal two of his gifts in the hollow of a third; nor (as pointed out by Mr. Coffey (1) in his evidence) would the donor mutilate some only of the objects as the defendants here allege to be the case. Mutilation would either be essential or an insult, and one would expect, therefore, to find all or none mutilated. Again, by virtue of what process have all these articles of such different sizes, weights, and shapes been kept together during all these years "under the whelming tide"? What magic bag had the Irish sea king which would withstand the action of the waves until the ornaments confided to its care found a safe resting-place in the soil formed on the surface of the beach when the sea receded? It was perhaps natural that the defendants should grasp at theories which, in justice to them, I may say were not invented for the purpose of this defence, but it is really little short of extravagant to ask the Court to assume the existence of a votive offering of a sort hitherto unknown in a land where such offerings are hitherto unknown, in a sea not known to have existed for 2000 and possibly 4000 years, to a sea god by a chieftain both equally unknown, and to prefer this to the commonplace but natural inference that these articles were a hoard hidden for safety in a land disturbed by frequent raids and forgotten by reason of the death or slavery of the depositor. It is perhaps hardly necessary to mention that my observations as to votive offerings are confined to votive offerings of the character suggested by the defendants, and have nothing to do with votive offerings in Christian churches, or with offerings to wells and fountains, of which many instances are collected in Brand's "Popular Antiquities," vol. ii. pp. 259 et seq. The view that I have expressed on the facts renders it unnecessary for me to express any opinion on the Attorney-General's further point that votive offerings may be treasure trove.

The defendants' next point is this. They say that the right

(1) Keeper of Irish Antiquities in the National Museum of Dublin.

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to treasure trove was granted by a charter of King Charles II. to the Irish Society, and that the Crown has, therefore, no title. The first part of this defence depends on the construction of the charter. In 1613 King James I. granted a charter to the Irish Society for the purpose of effectuating the settlement of Ulster. In 1638 this charter was cancelled, and in 1662 the existing charter was granted for the purpose of restoring all the property and rights created by the charter of James I. Counsel agree that the two charters are practically identical, and it is necessary to refer, therefore, to the later charter only. The material parts of the charter appear at pp. 7 to 9 and 13 and 14 of the print. I will not read them. It is sufficient to say that they contain at pp. 7 to 9 a grant of lands and rights couched in a multiplicity of words, including waived chattels, estrays, and franchises, but not treasure trove or royalties, and at p. 13 the appointment of the society as vice-admirals of the coast, with all royalties, &c., to the office appertaining, and at p. 14 the grant of wreck, flotsam, and jetsam. It is argued that treasure trove has passed under the word franchises, either by the general meaning of the word or by its meaning as used in this particular document. In my opinion that contention fails. A franchise is a Royal privilege or branch of the King's prerogative subsisting in a subject by a grant from the King: Chitty on Prerogatives, p. 119. So long as it is attached to the Crown it is called prerogative, but when granted to a subject it is called franchise: Chitty on Prerogatives, p. 118. For the present purpose franchises may be divided into two classes—those which the King has in his own hands as parcel of the flowers of his Crown, and those which have no existence until created by the King. See the case of *Abbot of Strata Mercella* (1): "It is to be known that when the King grants any privileges, liberties, franchises, &c., which were privileges, liberties, or franchises in his own hands, as parcel of the flowers of his Crown, as bona et catalla felonum, fugitivorum, utlagatorum, &c., bona et catalla waviata, extrahur', deodanda, wreccum maris, &c., within such possessions, there if they come again to the King

(1) 9 Rep. 25 b.

they are merged in the Crown, and he has them again in jure coronae; and if the wreck or goods waifed, estrays, &c., were appendant before to possessions, now the appendancy is extinct, and the King is seised of them in jure coronae. But when a privilege, liberty, franchise, or jurisdiction was at the beginning erected and created by the King, and was not any such flower before in the garland of the Crown, there, by the accession of them again to the Crown they are not extinct, nor the appendancy of them severed from the possessions; as if a fair, market, hundred, leet, park, warren, et similia, are appendants to manors, or in gross, and afterwards they come back to the King, they remain as they were before in esse not merged in the Crown, for they were at first created and newly erected by the King, and were not in esse before, and time and usage has made them appendant." This distinction is well settled, and was recognised in the case of *Duke of Northumberland* v. *Houghton*. (1) Franchises which belong to the King by right of his prerogative cannot pass under the general word "franchises" in a grant from the Crown, because they do not exist as such; until created by grant they are part of the prerogative; if created and resumed, they merge in the prerogative. But franchises which are no part of the flowers of the Crown have no existence until the Crown expressly creates them, and these, if resumed, do not merge—e.g., the right to felons' goods is in the Crown, and can be exercised simply by virtue of the prerogative; the right to a fair or market has no existence until the Crown has created it, so that although the Crown could create a fair or a market with tolls by charter, it could not enforce payment of tolls as for a fair or market by virtue of the prerogative without first creating the fair or market with tolls. It is of course clear that treasure trove belongs to the Crown by virtue of the prerogative; indeed, it is one of the instances given by Mr. Ellis in his argument in *Dyke* v. *Walford* (2) adopted by Lord Selborne and the Privy Council in *Attorney-General of Ontario* v. *Mercer*. (3) Nor is the word "franchises" superfluous in

(1) L. R. 5 Ex. 127. (2) 5 Moo. P. C. 434.
(3) 8 App. Cas. 778–9.

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the charter of Charles II. It would refer, and may well have been intended to refer, to those franchises of the second class which, if created, would remain appendant to the property in respect of which they were created, or in gross, as the case may be. Further, when the Crown desired to grant any of these flowers of the Crown they were expressly mentioned—e.g., waived chattels and outlaws, and wreck, flotsam and jetsam. The true inference is that treasure trove would have been also specified if it was intended to grant it. The same argument to some extent applies to the word "royalties." Mr. Warmington argued that the word "royalties" would be sufficient to pass these flowers of the Crown on the authority of *Dyke* v. *Walford* (1), cited above. The Attorney-General does not admit this, and I express no opinion on the point; but if it would, it is not suggested that treasure trove belongs to the office of vice-admiral, and the fact that the only royalties granted are those that belong to that office raises a strong presumption that none other were intended to pass. I have arrived at the conclusion that treasure trove does not pass by the charters by applying the ordinary rules of construction, so far as is compatible with the subject-matter of the grant, and it is therefore unnecessary for me to express any opinion on the contention of the Attorney-General as to the rules by which the Crown is entitled to have its grants construed. It is also unnecessary for me to express any opinion on the last point urged by the Attorney-General, which is of considerable general importance—namely, that in all claims to property the Crown is entitled to treat the defendant as if he were plaintiff, and to insist that he must succeed on the strength of his own title and cannot defeat the Crown merely by shewing that the Crown's title is bad. The result is that I will make a declaration that the articles in question are treasure trove belonging to His Majesty by virtue of the prerogative royal, and order the delivery up of the same accordingly.

Solicitor for plaintiff: *The Treasury Solicitor.*
Solicitors for defendants: *Warrens.*
Solicitor for Irish Society: *L. J. Maton.*

(1) 5 Moo. P. C. 434. H. L. F.

TENDRING HUNDRED WATERWORKS COMPANY *v.* JONES.

FARWELL J.

1903

July 31; *Aug.* 1, 3, 12.

[1901 T. 1584.]

Solicitor—Partnership—Liability for Acts of Partner—Scope of Partnership—Title-deeds—Legal Estate in Trustee—Duty of Solicitor to Cestui que Trust—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 11 (*b*).

G., a partner in the firm of J. & G., solicitors, was secretary to a company. The company purchased property, and for their own convenience had it conveyed to G. in his own name without any declaration of trust in the conveyance. The transaction was carried through and the conveyance settled by the firm of J. & G. as the company's solicitors. The conveyance, the only title-deed handed over, was retained by G. G. fraudulently raised money by deposit of the conveyance, and afterwards executed a legal mortgage to the equitable mortgagee. J. had no notice that the conveyance had been made to G. alone, or of any part of the transaction, except such notice as was implied by his firm having acted for the company. The partnership deed made the secretaryship a part of the partnership business:—

Held, that G. having a legal right as trustee to the possession of the deed, it was no part of the duty of the firm to see that he did not obtain it without the direction of his cestui que trust, the company. Assuming that the firm would have been liable for any negligence of G. in his duty as secretary, it was no part of such duty to act as trustee of the company's property. J. was therefore not liable for his partner's fraud.

THIS action was brought by the plaintiffs, a company incorporated by Act of Parliament, to make the defendant liable for the fraud of his partner Garrard.

In or about March, 1894, Garrard was appointed secretary to the plaintiff company. He was at the time articled to the defendant, who was a solicitor, and who was at that time carrying on business at Manningtree in partnership with a Mr. Doyle. On September 30, 1895, the defendant took Garrard into partnership with him in the Manningtree business in place of Doyle, who had gone to London. The defendant had another business as solicitor at Colchester, with which Garrard had nothing to do. The first clause of the partnership deed was as follows: "The said Henry William Jones and Charles Eagle Garrard will become and remain partners in the

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profession of solicitors at Manningtree aforesaid, but not elsewhere or otherwise, such partnership business to consist of the ordinary business of a solicitor of the High Court of Justice and Bankruptcy, and shall include conveyancing and all other matters of business usually undertaken by solicitors, and shall comprise and include all present appointments now or hereafter during the said partnership held by the said Henry William Jones in the Tendring Hundred but not elsewhere, and by the said Charles Eagle Garrard in the said Tendring Hundred or elsewhere, or either of them, as well as all premiums payable to either partner in respect of any articled clerk in the said Tendring Hundred and which premiums shall be deemed part of the partnership profits of the year in which such premium or premiums shall be received, but all sums received by either partner in his capacity as a commissioner to administer oaths, for swearing affidavits, or taking declarations shall not be included or form part of the partnership business aforesaid, but all receipts and income from the said Henry William Jones's appointment as clerk to the Tendring Hundred ustices, and all receipts and income from the said Charles Eagle Garrard's present appointments as well as any future appointments to be obtained by the said Charles Eagle Garrard and Henry William Jones, but so far as the said Henry William Jones is concerned only appointments which may hereafter be obtained in the Tendring Hundred shall constitute and form part of the said partnership business and assets as from June 24, 1895, during the term of fourteen years if the said Henry William Jones and Charles Eagle Garrard shall so long live under the style or firm of 'Jones & Garrard.'"

Clause 13 provided that "no partner shall without the consent of the other partner . . . . contract any debt or liability on account of the partnership, or employ any of the moneys or effects thereof, or in any manner pledge the credit thereof, except in the usual and regular course of business."

In 1898 the plaintiffs were minded to buy a piece of land, part of an estate called the Lawford estate, but desired that their name should not appear in the negotiations as intending purchasers, and instructed the firm of Jones & Garrard to

negotiate for the purchase through Doyle, who had become the London agent of the firm. This was done, and on August 4, 1898, an agreement was entered into between the owner and Garrard for the purchase by Garrard of the property in question for 550*l.*; a deposit of 50*l.* was paid by the firm of Jones & Garrard, the company having drawn a cheque for that amount in favour of the firm to enable them to pay the deposit.

There was an entry in the minute-book of the board of the plaintiff company that the signing of the agreement was reported by Garrard, "who asked for instructions as to conveyance of same, when it was resolved that the land be conveyed to the secretary for the present on his undertaking to convey to the company when called upon," and "that the following cheque be drawn—namely, C. E. Garrard, 503*l.* 11*s.* 11*d.*" This cheque was paid by Garrard into his own private account; but the amount subsequently passed into the firm's account in two sums at two different dates; and on October 21, 1898, the conveyance, duly executed by Garrard, was sent to Doyle with the firm's cheque for 510*l.*, and on October 27 the conveyance was executed by the vendors and was returned to Jones & Garrard by Doyle on October 29. It was a simple conveyance to Garrard in fee, but contained a covenant by him to fence off the purchased property, and keep such fence in good repair. On November 4, 1898, the completion of the purchase was reported to the board.

As the title-deeds related to other property of the vendor they were retained by him, the company taking an acknowledgment of the right to production. Only the conveyance, therefore, was handed over. No resolution of the board expressly referring to the custody of this deed was ever passed. From February 10, 1893, to April 10, 1902, the company rented a safe in the vaults of the Chancery Lane Safe Deposit Company. It was no part of the duty of the secretary of the company to hold the company's deeds or to accept conveyances of their land in his own name.

On November 23, 1899, Garrard fraudulently deposited the conveyance with Frederick Josiah Nunn as security for 500*l.* On September 12, 1900, the deed was returned by Nunn to

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Garrard "for the purpose of obtaining the money elsewhere." On March 1, 1901, Garrard resigned his secretaryship, under compulsion, in consequence of the auditor's complaint of his neglect in keeping the books. On March 27, 1901, the defendant commenced proceedings for the dissolution of partnership, and on March 29, 1901, he was appointed receiver and manager of the partnership business. On May 10, 1901, Garrard executed a legal mortgage of the property to Nunn, and handed over the conveyance to him. On August 5, 1901, judgment was given for dissolution as from that day. On October 17, 1901, the plaintiffs commenced this action against Jones alone, claiming a declaration that the defendant was liable for the fraud of his partner, and that he should be ordered to pay all moneys owing on the mortgage to Nunn, and to procure the property to be reconveyed to the company free from the mortgage.

It was assumed for the purpose of this action that Nunn was a purchaser for value having the legal estate without notice.

The company had never informed the defendant that the conveyance had been taken in Garrard's sole name, and the defendant had no notice or knowledge of the transaction until after Garrard's fraud had been committed, except so far as he was fixed with notice by reason of his firm's having approved the conveyance and received payment for so doing.

Upjohn, K.C., and *A. àB. Terrell*, for the plaintiffs. The case falls within s. 11 (*b*) of the Partnership Act, 1890 (53 & 54 Vict. c. 39): "Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss." In this case the defendant's firm received in the course of their business property, i.e., the deed of conveyance, belonging to the plaintiffs, and while in such custody Garrard misapplied it by depositing it as security for money borrowed for his own use. The defendant is liable for the consequent loss. It makes no difference that Garrard was secretary to the

plaintiff company. A secretary has no authority to retain the company's deeds. He is a mere servant: *Newlands* v. *National Employers' Accident Association* (1); *Barnett* v. *South London Tramways Co.* (2); *George Whitechurch, Limited* v. *Cavanagh.* (3) Garrard had no authority, express or implied, to apply for the deed as secretary, and it was never delivered to him as secretary. It was the possession of the deed that enabled Garrard to raise money: it was raised on an equitable mortgage by deposit of the deed. The legal mortgage was not executed till long after, when the original 500*l.* borrowed had been reduced to 400*l.* The possession of the legal estate enabled Garrard to do more harm than the mere possession of the deed would have done, but it was not the primary cause of the mischief. Jones must be taken to have known that Garrard had got the legal estate, and that was all the more reason for looking carefully to the custody of the deed. The fact that the fraudulent partner was a trustee will not exonerate the firm: *Marquise de Ribeyre* v. *Barclay.* (4) The principle of the cases is summed up in Lindley on Partnership, 6th ed. p. 170, to be, "That the firm has in the ordinary course of its business obtained possession of the property of other people, and has then parted with it without their authority." That exactly applies here. In *Rhodes* v. *Moules* (5) and *Earl of Dundonald* v. *Masterman* (6) the partners were made liable on the ground that it is everyday business of a solicitor to receive money from a client to invest on mortgage. It is much more everyday business to take charge of deeds. It may be that the company might sue the directors for negligence in conveying the legal estate to Garrard, but that does not affect their right to sue Jones. There was no duty on the part of the company to tell Jones of the conveyance to his partner, and therefore there was no negligence which would prevent their suing Jones.

Jenkins, K.C., and *Whinney*, for the defendant. It is not alleged that Jones made himself a co-trustee of the deed with

(1) (1885) 54 L. J. (Q.B.) 428.
(2) (1887) 18 Q. B. D. 815.
(3) [1902] A. C. 117, 124.
(4) (1857) 23 Beav. 107.
(5) [1895] 1 Ch. 236.
(6) (1869) L. R. 7 Eq. 504.

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Garrard; the plaintiffs' case is rested solely on the duty of Jones & Garrard to retain the deed until it was handed over to the company. But the company by taking the conveyance to Garrard alone had given him the legal right to the deed. The duty suggested by the plaintiffs is a duty to retain deeds against their legal owner, and not to hand them over to him without notice to his cestui que trust. There can be no such duty. The taking the conveyance in Garrard's name was an authority to hand the deeds to him: *Carritt* v. *Real and Personal Advance Co.* (1) The only mischief arose from the fact that the possession of the deed goes with the legal estate in possession, and the company by their own act had given that legal estate to Garrard. The deed was in the physical possession of Garrard. His being secretary had nothing to do with it, for it was not the secretary's duty to retain deeds. The legal explanation of his possession is a matter of inference only, and the Court will not infer against an innocent man. *Coomer* v. *Bromley* (2) is in the defendant's favour, though the precise point is not covered by authority.

In the *Marquise de Ribeyre* v. *Barclay* (3) the bonds in question had been in the custody of the firm before one partner was made a trustee, and there was a provision in the trust deed that the custody was not to be changed without a written authority.

This case comes within the principle laid down by Lindley L.J. (Lindley on Partnership, 6th ed. p. 173) in summing up *Ex parte Eyre* (4) and that class of cases: "A fraud committed by a partner whilst acting on his own separate account is not imputable to the firm, although had he not been connected with the firm he might not have been in a position to commit the fraud."

Upjohn, K.C., in reply.

Cur. adv. vult.

Aug. 12. FARWELL J. (after stating the facts as above). Under these circumstances the plaintiffs seek to charge the

(1) (1889) 42 Ch. D. 263.
(2) (1852) 5 De G. & Sm. 532.
(3) 23 Beav. 107.
(4) (1843) 1 Ph. 227.

defendant with the amount necessary to redeem the estate from Nunn. I will assume that the partnership contract bringing Garrard's secretaryship into the common partnership fund imposes on the defendant liability for Garrard's default in the performance of his duties as secretary; but it was no part of such duty either to accept a conveyance of the company's real estate, or to take charge of their deeds, or to advise them. The functions of a secretary are primâ facie clerical and ministerial only. To quote Lord Macnaghten in *George Whitechurch, Limited* v. *Cavanagh* (1): "They are of a limited and of a somewhat humble character. 'A secretary,' said Lord Esher (2), 'is a mere servant.'" No loss has been occasioned to the plaintiffs by anything done or omitted by Garrard in his capacity of or within the scope of his employment as secretary. Indeed, Mr. Upjohn did not put his claim on this ground at all. His contention is that the defendant is liable as Garrard's partner under s. 11, sub-s. (*b*), of the Partnership Act, 1890, that the defendant's firm drew the conveyance and received the completed deed in the course of their ordinary employment as solicitors for the plaintiffs, and that they have, therefore, received the property of a third person, and such property has been misapplied by Garrard, one of the partners, while in the custody of the firm. Now if a client leaves his deeds with his solicitors in the ordinary course of business, and a member of their firm fraudulently deposits them with another in order to raise money on them, I apprehend that the firm would be liable for the loss of the deeds, because such deeds when misapplied were in their custody. The solicitor could, of course, give no title to the estate comprised therein, but the firm would have to pay the costs incident to their recovery. But that is not this case. The real cause of the loss here is not the loss of the deed, but the conveyance of the legal estate by Garrard. Without such estate he could have made no title, and this loss would not have arisen. Now it is no part of the ordinary duty of a solicitor to accept conveyances of land belonging to his clients into his own name, still less when such conveyances contain covenants by the

(1) [1902] A. C. 124. (2) 18 Q. B. D. 817.

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grantee to expend money. The plaintiffs, for their own convenience, and without the consent of, or any communication to, the defendant personally, have chosen to vest the legal estate in this property in Garrard. Garrard has dealt fraudulently with that estate. How can the plaintiffs charge the loss arising from that fraud to the defendant? They by their own act enabled Garrard to commit it by putting him in a position which it was not within the scope of the partnership business for him to accept, and which gave him the legal title to the estate and the deeds relating thereto. This title enabled him at law to withdraw the deeds from the firm unless some duty was cast on the firm to prevent it. Accordingly it has been argued that the defendant's firm has been guilty of negligence in not preventing the withdrawal of the deeds. It is argued that, when A. instructs a firm of B. & C. to prepare a conveyance of land to B. in fee, who is in fact, though not so stated in the deed, a trustee for A., and leaves the deed with the firm, the firm is guilty of negligence if it allows B. to have possession of the deed without A.'s assent; and the argument was pushed to the length of applying it to every case of a conveyance to a bare trustee, whether a member of the firm or not, and of keeping the duty alive for any length of time until A. determines it. The argument excludes cases where the trustee is not a bare trustee; and it might perhaps be enough to say that Garrard was not a bare trustee in the present case, but had to perform covenants, and was entitled to a lien on the trust property for his indemnity: see *Morgan* v. *Swansea Urban Sanitary Authority*. (1) I do not, however, propose to rest my judgment on this ground alone; for, in my opinion, no contract can be inferred by the firm in the simple case above stated to do more than to exercise due care and skill in the preparation of the deed and to hand it over to the legal owner. The liability of a solicitor for negligence is a purely common law liability. Such negligence is tort founded on contract, so that an action ex contractu may be brought for the breach of contract or an action ex delicto for the tort. But in either case it is at common law; no bill

(1) (1878) 9 Ch. D. 582.

would lie in equity for the purpose: *British Mutual Investment Co.* v. *Cobbold.* (1) The plaintiff has to prove retainer by him of the solicitor for reward to do certain work and negligence in doing it. In this case the solicitors were retained simply to prepare the conveyance to Garrard and to receive the deed when executed and hand it over to the legal owner. They were not asked to advise on the form of the deed or the advisability of taking the conveyance to Garrard, nor were they asked to advise as to the custody of the deed. In order to succeed, therefore, the plaintiffs must allege and prove that the solicitors were retained for reward to keep possession of the deed until the equitable owner concurred with the legal owner in demanding it, involving the duty of refusing to hand over the deed to the legal owner without such concurrence. There is, of course, no evidence of any such contract in fact; but I am asked to imply it from the plaintiffs' instructions to Garrard, and through him to the firm to draw the conveyance to Garrard in his own name. It certainly cannot be said that such a contract is usual, so that it can be imported on the ground of known usage. I am not aware of any case in which any such contract is mentioned or suggested, nor were counsel able to refer me to any. It is an onerous duty, involving the possibility of disputes with the legal owner and the necessity of bearing the circumstances in mind during an indefinite period, possibly many years, and no extra remuneration is paid or payable by reason of its existence. But an implied contract (which assumes, of course, the non-existence of any actual contract) is founded on that obligation which ought "in justice and fair dealing" to be deemed to have been undertaken by the party sought to be charged: see *Freeman* v. *Jeffries.* (2) I fail to see the justice or fairness in any case of imposing on the partner who knows nothing of the circumstances an onerous duty without reward; but in the case before me, having regard to the conduct of the plaintiffs, it would be, in my opinion, positively unjust and unfair. The defendant knew nothing of the conveyance of the legal estate to Garrard. The acceptance of it was not within the scope of their partnership agreement. If

(1) (1875) L. R. 19 Eq. 627. (2) (1869) L. R. 4 Ex. 189.

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it has the effect contended for by the plaintiffs, such acceptance was a breach of art. 13 of the partnership deed, whereby neither partner was without the consent of the other to contract any liability on account of the partnership or in any way pledge the credit thereof, except in the usual and regular course of business. No consideration for this extra liability is given to the firm, and the plaintiffs, who rely on justice and fair dealing, themselves directed Garrard as their secretary to take this conveyance in his name for their own convenience, and neglected to take such steps as the most ordinary rules of prudence would have suggested to direct and see that the deeds went to their proper destination, the Chancery Lane Safe Deposit. I am of opinion that the plaintiffs by their own acts and conduct gave Garrard the legal title to the deed, and that Garrard by virtue of such title withdrew the deeds, so that they were not "in the custody of the firm" within s. 11, sub-s. (*b*), of the Partnership Act when Garrard handed them over to Nunn. I am further of opinion that no such contract by the firm as alleged can be implied, and that there has therefore been no negligence. I should add that the good faith and honesty of the defendant are undoubted and unchallenged. Nothing that I have said would have any application to a case of collusion with the guilty partner by the other member of the firm. The action fails, and is dismissed with costs.

Solicitors: *Free & Winckworth; Doyle, Devonshire & Woodhouse.*

J. R. B.

PULSFORD *v.* DEVENISH.

FARWELL J.

1903

Aug. 6, 7.

[1902 P. 2037.]

Company—Voluntary Winding-up—Dissolution—Unpaid Creditor—Statutory Duty of Liquidator to pay Debts—Negligence—Liquidator liable in Damages—Advertisement for Creditors—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 107, 133, 138, 143—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 25.

It is the duty of a liquidator to find out from the books and papers of the company and the statement of affairs who are the creditors of the company, and if any creditor omits to put in his claim the liquidator should communicate with him.

Sect. 133 of the Companies Act, 1862, imposes a statutory duty on the liquidator to pay the debts of the company pari passu, and, subject thereto, to distribute the property of the company amongst the shareholders; and whilst the liquidation continues a contributory can apply under s. 138 of the Act, and a creditor can apply under s. 25 of the Act of 1900, to the Court for relief in respect of his rights. When the company is dissolved the statutory remedy is gone, but the duty remains, and a contributory or creditor has a remedy at common law for injury caused to him by a breach of the liquidator's statutory duty.

A company went into voluntary liquidation and appointed a liquidator, and its business and assets were transferred as a going concern to a purchasing company in consideration of fully paid-up shares in the purchasing company, who covenanted to pay all the debts and liabilities of the liquidating company. The liquidator received the purchase consideration of fully paid-up shares and distributed them amongst the shareholders of the liquidating company. The assets of the liquidating company were sufficient to pay all its debts in full, but the liquidator, beyond advertising insufficiently for creditors, took no steps to ascertain the creditors of the liquidating company or to see that they were paid. He left everything to the purchasing company. After the dissolution of the liquidating company :—

Held, that the liquidator had been guilty of negligence in the discharge of his statutory duty, and was liable in damages to unpaid creditors of the liquidating company of whose claims he was aware and who had no notice of the liquidation until long after the dissolution of the company.

Dictum of James L.J. in *In re London and Caledonian Marine Insurance Co.*, (1879) 11 Ch. D. 140, approved and followed.

Knowles v. *Scott*, [1891] 1 Ch. 717, discussed and distinguished.

By a written agreement dated March 2, 1900, and made between the plaintiff Pulsford, as agent for and on behalf of his co-plaintiffs, the Société Centrale d'Electricité et de Lampes

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à Incandescence (a French company and hereafter called the plaintiff société), of the one part, and the Hiram S. Maxim Electrical Corporation, Limited (hereafter called the licensee company), of the other part, it was agreed that the licensee company should as from the date thereof have the grant from the plaintiff société, as beneficial owners, of a licence to make and use a certain patented invention for a term of eight years at a rent of 300*l.* per annum, the payments for the years 1900 and 1901 to be made on the signing thereof, and the next payment to be made on March 1, 1902, and the subsequent annual payments to be made on March 1 in each succeeding year; and it was thereby provided that the agreement should be deemed to be a contract made in England, and should be governed and construed according to the laws of England.

The defendant was a director of the licensee company, and negotiated the agreement of March 2, 1900, with the plaintiffs; and, as such director, he was a party to the affixing of the seal of the licensee company to the agreement in the usual way. The payments for the years 1900 and 1901, amounting to 600*l.*, were made on the signing of the agreement. The plaintiffs also in April and May, 1900, sold and delivered to the licensee company some 5000 lamps to the value of 124*l.* 2*s.* 6*d.* These lamps were not paid for, nor was the 300*l.* paid which fell due on March 1, 1902, under the agreement, the licensee company having in the meantime disposed of their business and assets to another company in manner following.

By a written agreement dated January 22, 1901, and made between the licensee company of the one part and another company (hereafter called the new company) of the other part, the licensee company agreed to sell to the new company their undertaking and all their assets (including the benefit of the agreement of March 2, 1900) as a going concern for 55,200*l.*, to be paid and satisfied as to 52,500*l.*, part thereof, by the issue to the licensee company or their nominees of 52,500 fully paid-up shares of 1*l.* each in the new company, and as to 2700*l.*, balance thereof, in cash; and it was thereby further agreed that the licensee company should pay their debentures

amounting to 2640*l.* and the interest thereon; and that the new company should pay and discharge all the trade debts and liabilities of the licensee company of every kind in due course of business, and complete all then existing contracts of the licensee company, and indemnify them against all claims and responsibilities arising out of or relating to the said debts, liabilities, and contracts. The defendant as a director of the licensee company was a party to the affixing of the seal of the licensee company to this agreement in the usual way. He was also a director of the new company, which was in fact a reconstruction company. For the purpose of carrying out this agreement the licensee company went into voluntary liquidation early in March, 1901, and the defendant was appointed the liquidator, and was authorized, when and so soon as the debts and liabilities of the licensee company had been paid and satisfied, to distribute the 52,500 fully paid-up shares amongst the contributories of the licensee company. The assets of the licensee company were sufficient to pay all their creditors, including the plaintiffs, in full; and all the creditors, other than the plaintiffs, were paid; and by a deed dated March 25, 1901, the business, goodwill, and assets of the licensee company, and the benefit of all contracts (including the agreement of March 2, 1900) were duly assigned to and vested in the new company; and by the same deed the new company covenanted to keep the licensee company indemnified against all claims and demands by reason of the non-performance or the non-execution of the said contracts. The 2700*l.* cash was applied in paying off the debentures of the licensee company, and the 52,500 shares were allotted to the defendant as liquidator, and by him distributed amongst the shareholders of the licensee company. On August 6, 1901, the defendant as liquidator submitted to a general meeting of the licensee company an account purporting to shew the manner in which the winding-up had been conducted and the property of the licensee company had been disposed of; and the next day (August 7) he made the usual return required by s. 143 of the Companies Act, 1862, to the Registrar of Joint Stock Companies, so that on the expiration of three months, i.e., on November 7, 1901, the licensee company was dissolved. The

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plaintiffs had no notice or knowledge of the liquidation and dissolution of the licensee company until June, 1902. The new company refused to pay the plaintiffs; and thereupon they brought this action against the defendant, alleging that the defendant wrongfully and in breach of his duty as liquidator made no provision for the claims of the plaintiffs, and had distributed the assets of the licensee company without making such provision, and they claimed by way of damages (1.) 1800*l.* under the agreement of March 2, 1900, and (2.) 124*l.* 2*s.* 6*d.*, the value of the lamps. It appeared from the defendant's evidence that he had no knowledge whatever of the plaintiffs' claim for the lamps; that, as liquidator, he had in April, 1901, advertised in the *London Gazette* and five other London newspapers for creditors of the licensee company; and that beyond these advertisements he had done nothing to ascertain who were the creditors of the licensee company, and had not paid a single creditor, but had left everything to the new company, relying on their covenant above stated.

Gore-Browne, K.C., and *S. R. Earle*, for the plaintiffs. We do not charge the defendant with fraud, but we do say that he has been guilty of wilful negligence in permitting the old company to be dissolved without providing for our claims. The old company being dissolved, we cannot sue the new company in the name of the old company, neither can we apply to the Court under s. 138 of the Act of 1862 as extended by s. 25 of the Act of 1900. Our statutory remedy is gone, and we cannot sue the defendant as a director: *Coxon* v. *Gorst*. (1) But s. 133 of the Companies Act, 1862, imposes a statutory duty on the liquidator to pay the debts of the company, and gives a private right to the creditors to have the debts paid pari passu. (2)

(1) [1891] 2 Ch. 73.

(2) The Companies Act, 1862, s. 133, enacts: "The following consequences shall ensue upon the voluntary winding-up of a company: (1.) The property of the company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company. (2.) Liquidators shall be appointed for the purpose of winding up the affairs of the company and distributing the property. . . . (10.) The liquidators shall pay the debts of the company. . . ."

The liquidator is a ministerial officer. He is a statutory trustee: *Black & Co.'s Case* (1); *In re Oriental Inland Steam Co.* (2); and if he fails to perform his statutory duty he must make good his default, and as the statutory remedy no longer exists we are left to our remedy at common law, and can sue him in damages for the injury caused us by the breach of his statutory duty. Our claim is equivalent to what was formerly called an action on the case: Comyns' Dig. Action upon Statute (F.); *Schinotti* v. *Bumsted* (3); *Carden* v. *General Cemetery Co.* (4); *Tilson* v. *Warwick Gaslight Co.* (5); *Ross* v. *Rugge-Price.* (6) The defendant may rely on *Knowles* v. *Scott* (7), but it does not apply. There the liquidation was pending, and the contributory could have applied to the Court under s. 138 of the Act; moreover, it was the case of an honest mistake. Nor does the case of *In re Hill's Waterfall Estate and Gold Mining Co.* (8) assist him, for there also the liquidation was pending, and the liability of a liquidator for negligence was not properly raised. Further, the defendant knew of our rights under the agreement of March 2, 1900, and he ought to have communicated with us. In Palmer's Company Precedents, 8th ed. Pt. II. p. 242, under the heading "Duties of Liquidator towards Creditors," it is said: "it is the duty of the liquidator to find out from the books and papers of the company and the statement of affairs who are the creditors of the company. If any creditor omits to put in his claim, the liquidator should communicate with him." No authority is cited for that proposition, but we submit it is sound. Here he did nothing. The position of a liquidator is analogous to that of an executor, and the defendant could have protected himself by applying to the Court under s. 107 of the Act for an order limiting a time for claims to be sent in. His advertisements were insufficient. Lastly, the defendant was himself a shareholder in the old company and has participated in its assets. Therefore he is

(1) (1872) L. R. 8 Ch. 254, 262.
(2) (1874) L. R. 9 Ch. 557, 559.
(3) (1796) 6 T. R. 646.
(4) (1839) 5 Bing. N. C. 253; 50 R. R. 682.
(5) (1825) 4 B. & C. 962; 28 R. R. 529.
(6) (1876) 1 Ex. D. 269.
(7) [1891] 1 Ch. 717.
(8) [1896] 1 Ch. 947.

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like an executor legatee who pays himself in preference to creditors. He has some of the assets of the old company still in his hands and can be made to account.

Upjohn, K.C., and *Adams*, for the defendant. The agent of a disclosed principal owes no duty to another principal, and, however guilty of negligence the agent may be, he is not liable to the other principal. A liquidator is only the agent of the company: *In re Anglo-Moravian Hungarian Junction Ry. Co.* (1) The claim here is for damages for a breach of duty committed whilst the company was in existence, and *Knowles* v. *Scott* (2) is a direct authority that, in the absence of fraud, mala fides, or personal misconduct, an action for damages for negligence will not lie against the liquidator at the suit of a creditor or a contributory. This is not a case of fraud or misfeasance, but of mere nonfeasance. The observations of James L.J. in *In re London and Caledonian Marine Insurance Co.* (3) are only dictum. Admitting that s. 133 of the Act imposes a duty on the liquidator, it only points out his duty to his own principal, and does not make him a statutory agent or trustee for every creditor and contributory. It is not his duty to communicate with the creditors and ask them to send in their claims. The section only lays down the course the liquidator is to pursue as agent of the company. If he neglects his duty, the creditor or contributory can come against the company. If he is guilty of misfeasance, then they can hit him under the statutory sections. That is not this case. If the argument for the plaintiffs is right, then *Knowles* v. *Scott* (2) was wrongly decided. But it has never been questioned, and it is cited in Buckley on Companies, 8th ed. p. 312, as the authority for the proposition that "The liquidator is not a trustee for each creditor and contributory so as to be liable in his capacity of trustee for negligence." With regard to the lamps, the new company have them and are ready to return them, but some have been broken.

Gore-Browne, K.C. If the lamps are returned, the plaintiffs

(1) (1875) 1 Ch. D. 130. (2) [1891] 1 Ch. 717.
(3) 11 Ch. D. 140.

are willing to reduce their claim on that head to 1*s.*, and make a reasonable allowance for broken lamps.

No reply was called for.

FARWELL J. I think I see my way to distinguish this case from *Knowles* v. *Scott*. (1) On March 2, 1900, an agreement was entered into under which the plaintiffs are now claiming payments for a licence granted by that agreement to a company which has since gone into liquidation, and which I will call the old company. Early in 1901 the old company entered into a contract to sell its undertaking and assets to a new company, and the new company covenanted to pay all the debts and liabilities of the old company. In March, 1901, the old company passed a resolution to wind up, and appointed the defendant its liquidator; and on March 25, 1901, a deed of transfer from the old company to the new company was executed containing the usual assignment of all property, including this particular licence, and a covenant by the new company to indemnify the old company (amongst other things) against all claims and demands in respect of the licence. On August 6, 1901, a final meeting of the old company was called by the defendant. He had himself been a director of the old company, and attested the affixing of the seal of the old company to the agreements and to the deed of transfer of March 25, 1901. On August 7, 1901, the registrar made his return, and the old company was finally dissolved on November 7, 1901. The defendant took no steps whatever to ascertain the claims of any creditors against the old company except by inserting advertisements in six London newspapers. He knew of the existence of this claim by the plaintiffs for the payments under the licence; but he says he did not know, and I accept his statement, of the existence of the claim for the lamps. If, however, he had performed that which I consider to be the duty of a liquidator, namely, not merely to advertise for creditors, but to write to the creditors of whose existence he knows, and who do not send in claims, and ask them if they have any claim, he would undoubtedly

(1) [1891] 1 Ch. 717.

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have received a claim, not merely for the instalments payable under the licence, but also for the purchase-money of the lamps. The advertisement itself is of a most unusual nature, the earliest appearing in a paper of April 20, 1901. It requires all the creditors to send in their claims by May 25, 1901, giving them very little more than a month, on peril of being excluded altogether. Now the defendant has told me that he did not pay one single creditor, that he took no steps whatever to see to the payment of any creditors of any sort, but left everything to the new company, and trusted entirely to their covenant of indemnity, and proceeded to call the final meeting of the old company, which would involve dissolution at the end of three months, without inquiring whether the new company had paid all the debts or not. He received, moreover, the consideration from the new company as liquidator for distribution among the shareholders of the old company, and he did so distribute it, and as a shareholder himself he received 2943 shares, which were nominally at par at the time, although not saleable to any extent. A more gross dereliction of duty by a liquidator I have seldom heard of. The question now arises whether he is under any liability to the plaintiffs, who sue in respect of debts of the old company, the plaintiffs knowing nothing whatever of the winding-up, not having seen the advertisements, not knowing that the company, their debtor, was dissolved and had disappeared. It certainly would be somewhat shocking if there were no remedy in such a case as this, and I am glad to have been able to persuade myself that there is a cause of action against the liquidator. Now the 133rd section of the Companies Act, 1862, enacts that the following consequences shall ensue upon the voluntary winding-up of the company. [His Lordship read the section, and continued :—]

Then s. 138 gives power in a voluntary liquidation to the liquidator or any contributory of the company, extended by s. 25 of the Companies Act, 1900, to any creditor, to apply to the Court in the winding-up; and s. 10 of the Act of 1890 gives power to the Court to compel a liquidator to repay money for which he has become liable, or to contribute to the com-

pany's assets by way of compensation. In my opinion the effect of these sections is to impose a statutory duty upon the liquidator to pay the debts of the company, so far at any rate as he knows of them and to the extent of the assets, with a remedy, so long as the liquidation continues, by application in the liquidation. But when and so soon as under the provisions contained in the Act of 1862 the company is dissolved, so that there is no longer any existing liquidation, then there is no longer a remedy under the Act. But the duty to pay the debts as stated above is an absolute statutory duty, without limit in point of time and with no provision for the release of the voluntary liquidator similar to that in s. 22 of the Act of 1890 for the release of other liquidators. It is not necessary to resort to trusteeship or equitable doctrines: the case is one of a duty imposed by statute on an individual for the benefit of a class of persons, namely, creditors; and the only peculiarity of the case is that the remedy created by the statute is not co-extensive in point of time with the duty, for the Act permits the destruction of the remedy before the duty has been performed; it has been held that the opening words of s. 142, "as soon as the affairs of the company are fully wound up," do not amount to a condition precedent. Now the principles applicable to such a duty as I have mentioned are well settled and rest on the well-founded assumption that the Legislature does not intend its enactment to be brutum fulmen: if, therefore, a statute creates such a duty but no remedy, an action at common law (in former days action on the case) will lie for breach of such duty: and by parity of reasoning, if the statute creates such a duty which remains to be performed after the remedy provided by the statute has expired, the Court must infer that the continuing duty was not intended to become one of imperfect obligation, but must hold that an action at law will arise on the cesser of the statutory remedy. If a remedy, however imperfect, is provided by the Act and is still subsisting, it is not for the Court to amend the remedy by a presumption which would impute want of wisdom or skill to the Legislature; but if there is a continuing duty and no continuing remedy, the Court cannot assume that the Legislature

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would stultify itself by leaving a duty in continued existence with no means of compelling its performance. In support of my view I will refer to Bramwell B.'s judgment in *Ross* v. *Rugge-Price*. (1) He is dealing there with certain rules which have the same efficacy as if contained in an Act of Parliament, and he says the plaintiffs' case is that the rules "give a private right to the plaintiffs, that that private right is infringed, and then, by the general law of the land, they are entitled to bring their action on the case, as it used to be called, against the defendant for that infringement. Now Mr. Prentice does not deny any of the general propositions contained in that argument, but what he says is, that the remedy is either by eviction or by application to the Court of Exchequer, and he relied on the well-known principle of law, which is abundantly illustrated by the cases that have been cited, that where a right is conferred by a statute, and a remedy for the violation of that right is enacted by the same statute, that is the only remedy, and you can have no other. That proposition of law is not in dispute." Then he goes on, after shewing why that proposition does not apply there: "Therefore I think that we are bound to hold this to be a case in which a private right is given to the plaintiffs, and that private right having been infringed by the defendant, and there being no statutory provision for a remedy to the plaintiffs, they are entitled to have recourse to the common law upon the authority of the cases that have been cited." Now, as I have already stated, the duty cast upon the liquidator to pay the debts of the company is not limited in time; but the continuance of the statutory remedy depends on the act of the liquidator himself: he and he only can bring about the dissolution of the company under ss. 142 and 143 of the Act of 1862. It would be a strange result if he could thus destroy all remedy against himself. I am confirmed in my opinion by the observations of James L.J. in the case of *In re London and Caledonian Marine Insurance Co.* (2) He says there, dealing with the case of the duties of a liquidator in a voluntary liquidation: "When the liquidator has done all that

(1) 1 Ex. D. 269, 271, 272. (2) 11 Ch. D. 144.

he can to wind up the company, when he has disposed of the assets as far as he can realize them, got in the calls as far as he can enforce them, and paid the debts as far as he is aware of them, and has done all that he can do in winding up the affairs, so that he has completed his business so far as he can, and is functus officio. Then it is his duty to call a meeting, to give in his account of the affairs of the company, and to make a return to the registrar under the Act," and the Lord Justice points out that when the company is fully wound up there is no power to go behind the dissolution except in the case of fraud. Then lower down on the same page he goes on to meet an argument that there might be some hardship in refusing to make—what they did in that case refuse to make—a compulsory winding-up order. He says that "during the existence of the company" there is no hardship, because if a creditor is injured he can come and get a compulsory winding-up, or take proceedings to obtain an injunction, as mentioned in one of the cases, to prevent the completion of the winding-up and dissolution of the company. "More than that"—by which I apprehend he means that, assuming he had not been in time to prevent the completion of the winding-up and the dissolution of the company—"if there had been any miscarriage on the part of the liquidator—if he had knowingly and wilfully left unpaid a debt of which he had notice"—now that means, as is apparent from the later part of the judgment, not mala fides, but if he had knowingly and wilfully left unpaid, that is to say, if he had not paid, some debt of which he was aware (although he may not have known its full amount)—"I am not prepared to say that the liquidator is not personally answerable to the creditor who has been unpaid, because the liquidator has violated a plain statutory duty to pay the debts pari passu out of the assets of the company as they came to his hands. The creditor might say, 'You have assets, you ought to have paid me; you did not pay me, and I have my remedy against you for that.' Certainly, if the liquidator were guilty of anything like mala fides or dishonesty or fraud"—which I apprehend to be quite different from what

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he had just mentioned, the plain statutory duty which gives a right at common law—"I do not care which word you use—or if any persons were his accomplices in that mala fides, dishonesty, or fraud, he and they could, no doubt, be made liable to the person defrauded by their conduct." That is to say, there would be a remedy in equity. That, in my opinion, states the position of the liquidator, limited, as I think the Lord Justice intended it to be limited, to the period after the completion of the winding-up and the dissolution of the company. If that be so, the case of *Knowles* v. *Scott* (1), on which so much reliance has been placed, has no application; and, if I may respectfully say so, it was rightly decided. It was an action by a contributory against the liquidator during the continuance of the liquidation, alleging that the liquidator was a trustee for him of certain shares, and asking originally that those shares should be transferred. At the trial, inasmuch as the shares had in the meantime been transferred, the plaintiff asked for damages for the delay in so transferring them. It is to be observed that, inasmuch as the liquidation was then pending, there was the statutory remedy to which I have referred under s. 138, and one of the grounds given by Romer J. in his judgment is (2): "It is said that, if this be so, the plaintiff had no remedy. That is not the case—he certainly could have applied to the Court under s. 138 of the Companies Act of 1862." Then he goes on to say: "All I hold is, that the liquidator is not liable to an action for damages for delay in performing his duty when that delay was not wilful or fraudulent and in no way arose from mala fides on his part." Limited, in the way I have put, to the period of the continuance of the liquidation and by reason of the existence of the statutory remedy given by s. 138, I respectfully agree. But the learned judge there had not to consider, nor did he in any way consider, the question before me of the destruction of the company by the liquidator, who has absolutely neglected the statutory duty cast upon him. The plaintiffs have not charged fraud, and I do not therefore rest my judgment on fraud; but it is difficult to see how any

(1) [1891] 1 Ch. 717. (2) [1891] 1 Ch. 723.

liquidator can honestly permit himself to bring about a dissolution of a company when he knows that a large debt of that company remains unpaid, and that he has not attempted to compel the new company to perform its obligation of payment of such debt; and not the less when he is himself interested as a shareholder in the new company. It was urged in argument that the liquidator is merely the agent of the company; but assuming this to be so, I can see nothing inconsistent in the imposition on such agent of a duty to the company's creditors. The result is that I hold that the liquidator is liable, and the amount of his liability will be the instalments payable under the licence, subject to usual discount at 5 per cent. The amount can be proved by affidavit, unless the parties agree, and it can go into the order. There will also be judgment for the amount of the purchase-money of the lamps, the amount to be reduced to 1*s.* if the lamps are returned, less such number of the lamps, not exceeding, say 100, as have been destroyed. This does not amount to holding that the liquidator is liable for a debt of whose existence he is not aware, but results from what I have already stated, that he is liable to a creditor whom he knows to have a valid claim for all claims that such creditor can substantiate against the company.

Solicitors for plaintiffs: *Braby & Macdonald.*
Solicitors for defendant: *Terrell, Terrell & Varley.*

H. L. F.

JOYCE J.
1903
May 19, 20;
June 27.

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[1902 H. 3708.]

Highway—Roadside Strip—Land between Fences separating Highway from Adjoining Land—Presumption of Dedication.

In the case of an ordinary highway running between fences, although the space between them may be of a varying and unequal width, the right of passage or way primâ facie, and unless there be evidence to the contrary, extends to the whole of the ground between the fences, and the public are not confined to the metalled portion. All the space between the fences is presumably dedicated as highway unless the nature of the ground or other circumstances rebut that presumption, and the owner of the adjoining lands is not intitled to enclose any portion of it.

Mere disuse of a highway for any length of time cannot deprive the public of their rights in respect of it. The mere consent of a highway authority to an obstruction or encroachment upon the highway is ineffectual for the purpose of legalising that obstruction or encroachment.

Neeld v. *Hendon Urban Council*, (1899) 81 L. T. 405, distinguished.

TRIAL OF ACTION.

The plaintiff was the owner in fee of certain lands known as Trenowth, in the parish of Probus, in the county of Cornwall, which he had purchased in 1889. Adjoining the said lands was a highway leading from Grampound Road to Probus. On the eastern side of the highway, between the metalled road and the fence of the plaintiff's adjoining lands, was a strip of roadside waste to which the plaintiff claimed to be entitled, and a portion of which he now proposed to inclose.

The highway was a main road vested in the Cornwall County Council, but the defendant council had, pursuant to s. 11, sub-s. 4, of the Local Government Act, 1888, undertaken the maintenance and repair thereof.

The strip of land in question was about 150 yards long, and varied in breadth from a point to which it gradually narrowed at each end to about twenty-two feet in the broadest part. The entire space between the ancient fences, including both the metalled road and the strip of roadside waste, varied from thirty to forty-three feet.

Prior to the year 1885 the strip in question was entirely uninclosed and open to the public. In 1885 a Mr. Hendy, the then owner of Trenowth, had placed a row of pegs upon the strip with a view, as it was alleged or suspected, of building upon part of it. This was objected to, and the then surveyor to the highway authority caused the pegs to be removed. In 1887 one Barber, a local policeman, with the permission or encouragement of the same Mr. Hendy, inclosed a portion of the strip about sixty yards in length and from nine to twelve feet wide with brushwood and turf, and for about two years cultivated it as a garden. Subsequently Hendy's gamekeeper or woodman put up some wire along the fence. Thereupon, namely, in October, 1889, one McCoskrie, in assertion of the public right, destroyed a portion of this fence, and for this was summoned before the justices by Mr. Hendy, and was convicted and fined. A case for a higher Court was, however, granted, but not proceeded with by McCoskrie, who, as he deposed in this action, could not afford to carry the matter further. After 1889 the fence constructed by Barber was not maintained or repaired.

It appeared that for many years past the road authority had used a portion of the strip in question for the purpose of depositing stone for the repair of the roads, and that at one time the road surveyor, without authority from his employers, had arranged to pay, and had paid, a nominal rent to the plaintiff in respect of this user; but this payment was disallowed by the road authority in the surveyor's accounts.

In 1886 or 1887 a small wooden building used as a stable was erected partly on a portion of the strip in question and partly on what had at a former time been a portion of the metalled road. The plaintiff had received rent for this building, and had recovered judgment in the High Court for possession against the occupant in default of appearance.

In September, 1903, the plaintiff erected a wall round a portion of the strip separating it from the rest of the highway. The defendants, who were the highway authority for the rural district of Truro, caused a portion of this wall between the strip and the highway to be thrown down.

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The plaintiff then brought this action, claiming (1.) a declaration that no portion of the strip nor of the site of the building erected in 1887 formed part of the highway, and that the public had no rights upon or over the strip or the site of the building; and (2.) an injunction restraining the defendants from breaking down the wall or any fence on the said strip, and from trespassing thereon, and from demolishing the said building, and from depositing road materials upon the strip without the leave of the plaintiff.

The defendants alleged that from time immemorial down to 1885 the strip of land had been open waste, over which the public had exercised rights of way and passage and other rights which were consistent only with dedication of the land to the public. In resisting the inclosure of the land they claimed to be acting in pursuance and execution of the duties imposed on them by s. 26 of the Local Government Act, 1894, and also as the representatives of the county council of Cornwall under s. 11, sub-s. 4, of the Local Government Act, 1888.

Foote, K.C., Hughes, K.C., R. C. Glen, and *A. A. Bethune,* for the plaintiff. The plaintiff is in possession of this strip of land, and has exercised acts of ownership over it since 1889. It is for the defendants to prove that it is part of the highway, i.e., that it has been dedicated to the use of the public: *Easton* v. *Richmond Highway Board* (1); *Evans* v. *Oakley.* (2)

Tindal Atkinson, K.C., A. Whitaker, and *Crossfield,* for the defendants. The defendants are in the same position as if this were not a public highway at all. They have an independent duty to perform where the roadside waste is threatened.

The plaintiff is unlawfully encroaching on the roadside waste, which is part of the highway. The question of the ownership of the soil is immaterial. The sole question is whether this strip forms part of the highway or not. It was quite open to the highway until 1885. In the case of a highway running

(1) (1871) L. R. 7 Q. B. 69. (2) (1843) 1 C. & K. 125.

between fences, there is a presumption that the public have a right of passage over the whole space lying between the fences: *Reg.* v. *United Kingdom Electric Telegraph Co.* (1)

There is nothing in this case to shew that the history of the strip of land is not the same as that described in *Steel* v. *Prickett.* (2)

There is no other suggestion how this piece of waste came into existence.

There is no suggestion of a manorial origin.

There is nothing since 1886 to rebut the ordinary presumption that this forms part of the highway. No doubt that presumption may be rebutted. The following cases illustrate the kind of circumstances under which it may be rebutted: *Neeld* v. *Hendon Urban Council* (3); *Countess of Belmore* v. *Kent County Council.* (4)

Here there is a sudden starting into life of acts of ownership by the owner of land adjoining the highway. There has been user by the public in ways which are inconsistent with private ownership.

[JOYCE J. referred to *Reg.* v. *Train.* (5)]

If there has been dedication, non-user by the public for any length of time cannot take it away.

Foote, K.C., in reply. The presumption that the whole of the space between the boundary hedges is highway does not arise where one part of the roadside waste is much wider than the rest: *Neeld* v. *Hendon Urban Council* (3); *Countess of Belmore* v. *Kent County Council.* (4)

The fact that the public authority never took any steps to assert the rights of the public over the strip affords a strong presumption that it is not part of the highway.

Dedication alone is not sufficient. There must at least be some evidence of acceptance: *Attorney-General* v. *Biphosphated Guano Co.* (6) Mere dedication would not throw on the public the liability to repair under 5 & 6 Will. 4, c. 50,

(1) (1862) 2 B. & S. 647, n.
(2) (1819) 2 Stark. 463, 469; 20 R. R. 717, 721.
(3) 81 L. T. 405.
(4) [1901] 1 Ch. 873.
(5) (1862) 31 L. J. (M.C.) 169.
(6) (1879) 11 Ch. D. 327.

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s. 23. Possession with the acquiescence of the local authority is sufficient to rebut the presumption that the strip is highway.

Cur. adv. vult.

June 27. JOYCE J. (after stating the facts). I do not consider that the title of the plaintiff to the soil of the strip was by any means proved. Indeed, there is a question as to whether his estate of Trenowth, which lies on the east of the road, does, as he contends, or does not extend beyond his fence so as to comprise the strip; but both parties desire that I should determine the principal question, namely, the right (if any) of the public over this roadside waste.

In the first place, as the admitted plan shews, the old fences on either side of the road are as regular and continuous as one ever sees them, though the distance between them is not perfectly uniform. Indeed this is seldom, if ever, found to be the case, except where the land has been first inclosed in recent years; or the road has been set out of uniform width by the award of commissioners, or otherwise, under some Inclosure Act or other statute. The extreme width between the ancient fences, which include between them both the hard road and the strip, appears to vary from thirty to forty-three feet at the most—by no means an extraordinary width for a public highway. There is evidence to shew that the hard road at one time ran much nearer to the fence on the eastern side than it does now. It is also the fact that not long before 1870 the metalled portion of the road was widened at the expense of the strip as then existing without any objection from the then owner of Trenowth.

Prior to the year 1885 no part of the strip was inclosed, nor was the use thereof by the public obstructed in any manner. In my judgment the ancient and present fence bounding the inclosed lands on the eastern side of the road was put up or constructed in reference to the highway, and not as a boundary between the inclosed land and any piece of uninclosed waste, and the strip generally appears to have been actually used in the same manner and to as great an extent as roadside wastes belonging to the highway, but not metalled or kept in repair, are commonly used.

In the case of an ordinary highway running between fences, although it may be of a varying and unequal width, the right of passage or way primâ facie, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot-passengers. All the ground that is between the fences is presumably dedicated as highway unless the nature of the ground or other circumstances rebut that presumption: see Leake on Uses and Profits of Land, p. 493. Upon this otherwise settled rule it was suggested that some doubt had been thrown by the recent decision in *Neeld* v. *Hendon Urban Council*. (1) But there it was found as a fact that the ground in question was formerly part of the waste of the manor, and had been so dealt with all along until the occurrences which gave rise to the action. That alone, in the opinion of A. L. Smith and Vaughan Williams L.JJ., rendered the general doctrine of the cases inapplicable, and the latter judge says expressly: "The presumption is that primâ facie, if there be nothing to the contrary, the public right of way extends over the whole space of ground between the fences on either side of the road; that is to say, that the fences may primâ facie be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated." The case of *Countess of Belmore* v. *Kent County Council* (2) was a decision upon the particular facts, and the piece of ground in question had at no time within living memory been used otherwise than as private property, and that without objection of any sort or kind.

The supposed explanation of the fact that the land apparently dedicated for a highway is often wider than that now kept in repair is to be found in the judgment of Abbott C.J. in *Steel* v. *Prickett*. (3) Macadam's system of roadmaking with broken stone was not introduced at the earliest until just before the end of the eighteenth century. And, as Lord Tenterden

(1) 81 L. T. 405, 410. (2) [1901] 1 Ch. 873.
(3) 2 Stark. 469; 20 R. R. 721.

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observed in *Rex* v. *Wright* (1), "The space at the sides" (that is of the hard road) "is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the part actually used as road it could not be kept sound."

If this dispute had arisen and the action had come on to be tried in 1885, there would not, in my opinion, have been any evidence whatever to rebut the presumption that all the ground between the fences of the road at the place in question had been dedicated as highway. It is an established maxim that once a highway always a highway. The public cannot release their rights. Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper. The authorities for this are to be found in any of the ordinary text-books on the law of highways, and there is a well-known case where some of the encroachments on the roadside waste had existed for more than forty years, but it was held that no period of modern enjoyment was of any avail to deprive the public of the right they had once enjoyed.

Suppose, then, that in the year 1885 the plaintiff's predecessor in title, as owner of the Trenowth estate, had succeeded in inclosing the strip of land now in question in the absence of effective opposition from the then highway authority, it appears to me that even uninterrupted possession for the seventeen years before the present dispute began would not and could not have legalised the encroachment. [His Lordship then referred to the facts as to what had taken place since 1885, and continued:—]

There was some evidence that brushwood had been taken or portions of the ground cleared by the owner of Trenowth; but whether the strip be part of the highway or not, of course any timber or underwood growing thereon would belong to the owner of the soil and not to the highway authority. At all events what is now proposed, and which has caused this action,

(1) (1832) 3 B. & Ad. 681, 683; 37 R. R. 520.

is a new inclosure by a fence farther away from the hard road than that made by Barber, the policeman.

The road authority for the time being have as far back as living memory extends used a portion of the strip for the purpose of depositing stone or other material for the repair of the roads. A few years ago a somewhat larger space was required for this purpose, and the surveyor without any authority from his employers arranged to pay the plaintiff 2*s.* 6*d.* per annum in respect of this. A sum of 10*s.* was actually paid on this account, but the payment was disallowed and the surveyor's action in the matter practically repudiated by the authority.

But even if the highway authority had actually consented to any obstruction or encroachment upon the strip being part of the highway, such consent could not legalise that which was otherwise illegal. The highway authority had consented to the obstruction complained of in the case of *Reg.* v. *United Kingdom Electric Telegraph Co., Ld.* (1), as also in the well-known case of *Reg.* v. *Train* (2), but such consent was held to be wholly ineffectual.

As I understand it, all that the defendants have done is to cause to be broken down a portion of the new fence or wall in process of erection by the plaintiff. This, I think, they were entitled to do if such fence was an illegal encroachment, as I hold it to be, there being, in my opinion, in the present case no sufficient evidence to rebut the presumption that the whole of the land between the fences of the road where the plaintiff proposed to inclose forms part of the highway, and there being nothing in the dimensions, shape, or character of the ground to make the presumption inapplicable. If necessary I hold, as a matter of fact, that the fences of the road here were put up for the purpose of separating land dedicated as a highway from land not so dedicated.

The statement of claim also asks for a declaration that no portion of the site of a certain building at the northern end of the strip forms part of the highway. This building is a small wooden erection with a zinc or corrugated iron roof erected in 1886 or 1887. I find as a fact that the western half of this site

(1) (1862) 6 L. T. (N.S.) 378. (2) 31 L. J. (M.C.) 169.

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stands upon ground which formerly was actually part of the metalled road. There is, in my opinion, still less evidence to rebut the legal presumption which I have mentioned in reference to this site than in reference to the portion of the strip proposed to be inclosed. The possession of a squatter on the highway since 1886 cannot bar the public right.

In my opinion the plaintiff's claim fails with respect to this, as well as with respect to the attempted inclosure—that is to say it fails altogether, and the action must be dismissed with costs.

[On a subsequent application by the defendants costs were allowed to them as between solicitor and client under s. 1 (*b*) of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).]

Solicitors: *Coode, Kingdon & Cotton, for Chilcott & Sons, Truro; J. A. Bartrum, for R. Dobell, Truro.*

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[1902 H. 3600.]

June 22, 23, 24, 25, 29; *July* 4.

Mortgagor and Mortgagee—Mortgage to Friendly Society—Sale under Power—Sale by Auction—Purchase by Officer of Society—Invalidity.

In 1899 the plaintiff mortgaged certain property to the trustees of a friendly society to secure an advance. In 1902 they, in exercise of their power of sale, which had arisen, put up the property for sale by auction, such sale being directed and entirely managed by a committee of the society, whose duty it was to realize mortgage securities. Previous to the sale D., a member of the committee, had on his own account inspected the property. He knew the reserve, if he had not himself fixed it, and he took part in instructing the auctioneer, who was nominated by him. He attended the auction, and bought the property for himself—the plaintiff, who had only accidentally heard of the sale three days before it took place, being present and bidding against him. The sale was at a small undervalue. In an action against the trustees of the society and D.:—

Held, that the sale was invalid, and that the plaintiff was still entitled to redeem the mortgage.

In this action the plaintiff, who was the wife of a gardener suing in respect of her separate estate, sought to set aside the sale by the mortgagees of certain property of which she was the mortgagor.

By an indenture dated April 6, 1899, the plaintiff mortgaged five leasehold houses in Arlington Street, Islington, to the then trustees of the London United District of the Ancient Order of Foresters to secure the repayment of an advance of 1300*l.* with interest at 4*l.* 10*s.* per cent. per annum, repayable by quarterly instalments made up of principal and interest, with a proviso that should default be made in payment of any instalment for sixty days the whole amount then remaining unpaid should forthwith become payable on demand.

The defendants, other than Drew, were the present trustees of the society.

The rules of the society provided that there should be four trustees of the district who should be ex-officio members of the investment committee. In addition to the ex-officio members the investment committee consisted of four elected members,

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of whom the defendant Drew was one. It was part of the duty of this committee to superintend the realization of mortgage securities.

On May 17, 1902, two quarterly instalments of principal and interest under the mortgage were due and unpaid. On June 17, 1902, the trustees, without notice to the plaintiff, appointed a receiver of the property.

On July 3, 1902, there was a meeting of the investment committee at which it was determined to sell the property. There was a conflict of evidence as to how or by whom the reserve price was fixed at 1350*l.* A member of the committee was deputed to instruct the auctioneer, who, in the view which his Lordship took of the evidence, was nominated by the defendant Drew. Drew was also present when the instructions were given to the auctioneer.

On July 28 the property was put up for sale by auction, the plaintiff having had no notice of the intended sale until July 25.

The defendant Drew attended the sale, and became the purchaser of the property at the price of 1475*l.*, outbidding the plaintiff, who was also present. He had, previously, without the knowledge of his colleagues, inspected the property, and had also called upon the plaintiff with the object, as his Lordship held, of trying to get the property for himself from her without the expense of a sale by auction being incurred.

After purchasing the property Drew obtained from the society an advance of 1450*l.* upon it coupled with a small collateral security. There was evidence that the sale was at an undervalue, though not very great.

The plaintiff claimed a declaration that the sale was not binding on her, and that she was still entitled to redeem.

The defendants alleged that Drew had purchased on his own behalf, at a fair and reasonable price; that the sale was in all respects bonâ fide; and that the transaction was not affected by the fact that Drew was a member of the investment committee.

Beddall and *Earle*, for the plaintiff. This is practically a sale by mortgagees to one of themselves. The mere fact of

Drew, who was known as an official of the society, attending the sale and bidding would have the effect of deterring others from doing so. Such a sale cannot be maintained. The case is covered by the decision in *Martinson* v. *Clowes*. (1)

Hughes, K.C., and *Martelli*, for the trustees of the society. A mortgagee is not in the ordinary sense a trustee for the mortgagor. He must, of course, act bonâ fide. A sale by a mortgagee to an agent or trustee for himself is, no doubt, invalid; but no such case is made out here.

[JOYCE J. The sale was to a member of the investment committee who managed and conducted the sale.]

No doubt such a case requires careful investigation, and it was undesirable that a member of that committee should buy the property; but unless it is proved that Drew bought on behalf of the society, the fact that he was a member of the investment committee is immaterial.

Where a mortgagee is selling under his power of sale, the only obligation upon him is to act in good faith: *Kennedy* v. *De Trafford* (2); *Farrar* v. *Farrars, Limited* (3); *Warner* v. *Jacob*. (4)

So far as the trustees are concerned, no case of conspiracy is made out. On the evidence Drew took care not to let the trustees know what he was doing. There was no conflict of interest and duty in this case. So far as the trustees were concerned, they had no interest in bringing about a sale at an undervalue. The mortgagees did nothing improper, and nothing that Drew did in the least affected the price. Even assuming that he instigated and managed the sale, and fixed the reserve price, all that would be immaterial if the mortgagees acted bonâ fide.

There is no evidence of fraud against any of the trustees, nor of collusion between them and Drew. Unless the plaintiff can shew that Drew was buying on behalf of the society, everything else is immaterial.

George Lawrence, for the defendant Drew. This sale can

(1) (1882) 21 Ch. D. 857; and on appeal 52 L. T. 706; W. N. (1885) 41.
(2) [1897] A. C. 180.
(3) (1888) 40 Ch. D. 395.
(4) (1882) 20 Ch. D. 220.

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only be impeached on the ground that it was a sale by the mortgagees to themselves, or to an agent for themselves, or on the ground of conspiracy and fraud. The fact that Drew may have schemed to get the property for himself is immaterial.

[JOYCE J. Could the society have sold to Drew privately?]

Yes; the vendors are the trustees, and they alone had power to sell. The fact that Drew may have known the reserve price is immaterial, inasmuch as the biddings went beyond it. A sale by a mortgagee to an agent who is not his agent for the purposes of the sale is not invalid: *Nutt* v. *Easton*. (1)

Legally the trustees were the vendors, and the fact that the investment committee assumed the powers of the trustees does not put them in the position of vendors. The sale was a bonâ fide sale; there was no conflict of interest and duty, and no collusion, and the plaintiff is not entitled to succeed. This case is not covered by *Martinson* v. *Clowes*. (2)

Beddall, in reply. A mortgagee cannot sell to himself, or to his solicitor or agent for sale. He cannot sell to any one concerned in or connected with the sale on his behalf; and he must act bonâ fide. What is good faith depends upon all the circumstances of the case: *Kennedy* v. *De Trafford*. (3) In this case Drew was clearly an agent for sale. He was a member of the committee whose duty it was to manage the sale, and who fixed the reserve price. On the evidence it is impossible to say that the sale was in good faith to a person who was not an agent for, and not connected with, the sale. In a case of suspicion, as this is, the onus is shifted upon the mortgagees to uphold the sale: *Farrar* v. *Farrars, Limited*. (4) This sale cannot stand: *Twining* v. *Morrice* (5), *Nelthorpe* v. *Pettyman* (6); *Parnell* v. *Tyler* (7); *Tennant* v. *Trenchard* (8); *Guest* v. *Smythe* (9); and *Martinson* v. *Clowes* (2), which was approved by Lindley L.J. in *Farrar* v. *Farrars, Limited*. (10)

Cur. adv. vult.

(1) [1899] 1 Ch. 873.
(2) 21 Ch. D. 857; and on appeal 52 L. T. 706; W. N. (1885) 41.
(3) [1897] A. C. 180.
(4) 40 Ch. D. 395.
(5) (1788) 2 Bro. C. C. 326.
(6) (1808) 14 Ves. 517.
(7) (1833) 2 L. J. (N.S.) (Ch.) 195; 37 R. R. 304.
(8) (1869) L. R. 4 Ch. 537.
(9) (1870) L. R. 5 Ch. 551, 556.
(10) 40 Ch. D. 409.

July 4. JOYCE J. (after stating the facts and observing that the plaintiff appeared to be a person of some business capacity, but of imperfect education). The mortgagees are the trustees of a friendly society, the hand by which the society acted throughout in this transaction being the investment committee. The defendant Drew, who described himself as a builder and a buyer of properties, is a member of that committee. On the 18th or 19th of June he appears, unknown to his colleagues, to have made a careful inspection of the plaintiff's houses, and to have conceived the idea of buying them and making a profit for himself out of the transaction. On June 20 he called on the plaintiff. There was considerable conflict of evidence as to what took place at that meeting. [His Lordship then considered the evidence upon that point, and continued:—]

I have formed the opinion that Drew went on June 20 to see if he could get the property for himself. On July 3 there was a meeting of the investment committee, when it was decided to put the property up for sale. It was true the society were entitled to sell. The minute-book was not disclosed until during the course of the trial; but I observe, on looking through it, that on many occasions the society has in cases of default allowed the payment of instalments to stand over upon interest being paid. I should not have been surprised if they had done so in this case. Who was it, then, who proposed the sale? There is no entry in the minute-book to shew, but of two members of the committee who gave evidence neither would swear that it was not Drew. I think at all events that it was Drew who nominated the auctioneer. He also went with the member of the committee who was deputed to instruct the auctioneer, and was present when the instructions were given. The reserve price was fixed at 1350*l*. Witnesses for the defence stated that the reserves were always fixed by the trustees of the society, and not by the investment committee. I have examined the minute-book and find that this is not true. On the whole, I think it is highly probable that Drew himself, either directly or indirectly, fixed the reserve. No intimation was given to the

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plaintiff of the intended sale, and it was merely by accident that she discovered on the previous Friday that a sale was to take place. She could not get any copy of the particulars until the Saturday, and the sale was on the Monday. Drew attended the sale, many members of the society being there. He was the only member of the committee present, and was the principal bidder, the effect of which might be to discourage the sale. The bidding ended in a competition between Drew and the plaintiff's sister, who was bidding on her behalf. Drew knew the reserve price which was of course more than sufficient to cover all principal, interest, and costs. If the plaintiff had known when this had been passed she might have stopped the sale, or she might have continued to bid until the property was knocked down to her, inasmuch as any surplus realized would be her own.

Now what is the law in a case of this sort? It is true that a mortgagee is not a trustee for sale in the ordinary sense. He has rights of his own, but he is under certain obligations to the mortgagor, especially where the security is ample. The mortgagee in this case is not an ordinary individual, but a society, an artificial person acting through the agency of the committee. A mortgagee may, under certain circumstances, sell to his own solicitor; but the solicitor or agent managing the sale cannot as against the mortgagor sell to himself. In *Farrar* v. *Farrars, Limited* (1), Lindley L.J. said: "It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself either alone or with others, nor to a trustee for himself . . . . nor to any one employed by him to conduct the sale. . . . . A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power." So, too, in *Martinson* v. *Clowes* (2), where the circumstances were analogous to the present case, but not quite the same, North J. said: "It is quite clear that a mortgagee exercising

(1) 40 Ch. D. 409.

(2) 21 Ch. D. 857; and on appeal 52 L. T. 706; W. N. (1885) 41.

his power of sale cannot purchase the property on his own account, and I think it clear also that the solicitor or agent of such mortgagee acting for him in the matter of the sale cannot do so either." Then, again, as to agents, in the case of *In re Bloye's Trust* (1) Lord Cottenham said: "If the principal is incapacitated, can the agent do that which the principal could not?" And further on, quoting Lord Eldon in *Downes* v. *Grazebrook* (2), he asks, "whether if a party is incapacitated from purchasing he can employ an agent to do that which he could not do himself; and whether that agent had a power to purchase which his principal had not: it would be the most absurd distinction in the world."

Upon the evidence in this case I find as a fact that the property was sold at an undervalue, not of itself so great as to invalidate the sale, but still at an undervalue. The investment committee could not have sold privately to themselves either as representing the society or as individuals at a price fixed by themselves, nor could they, I think, have so sold to one or more of their number. It is said that any such objection is cured by the fact that the sale was by auction. I do not think so. At all events, the principle laid down in *Farrar* v. *Farrars, Limited* (3), applies to this case, and the onus is on the defendants to shew that everything was done fairly and bonâ fide. Fraudulent conspiracy amongst all the defendants has not been proved, but the result of the evidence has been to make me distrust all the persons who were mixed up in the sale. I think that the plaintiff has not been fairly and honestly dealt with. How can it be said that there was no collusion between the committee and the purchaser when he was an active member of their body—the only member who attended the sale? Further, where his interest was in conflict with that of the plaintiff, I have not the slightest doubt that he preferred his own. Upon the admitted facts the case was one of grave suspicion, and that suspicion has not been lessened by what has transpired in the course of the trial. I do not think that

(1) (1849) 1 Mac. & G. 488, 494, 495.

(2) (1817) 3 Mer. 200; 17 R. R. 62.

(3) 40 Ch. D. 395.

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everything has been done fairly and bonâ fide, and the sale must be set aside. The defendants will pay the costs of the action.

Solicitors for plaintiff: *Churchman & Winser.*

Solicitor for defendant Drew: *G. H. Daniell.*

Solicitors for defendants, the trustees: *Whittington, Son & Barham.*

G. A. S.

SWINFEN EADY J. 1903 *June* 10; *July* 2.

In re VALLETORT SANITARY STEAM LAUNDRY COMPANY, LIMITED. WARD *v.* VALLETORT SANITARY STEAM LAUNDRY COMPANY, LIMITED.

[1902 V. 422.]

Company—Debentures—Floating Security—Prior Charge precluded—Equitable Incumbrancers—Notice—Priority.

On November 26, 1898, the managing director of a limited company, forgetting that their first mortgage debentures, though only constituting a floating security, precluded the creation of any prior charge, deposited the company's title-deeds with their bank to secure the present and future overdraft of their current account. The bank, though aware that debentures had been issued, some of which they held as security for another customer's account, made no inquiry in the matter:—

Held, that the mere possession of the debentures as security for another customer's account did not affect the bank with notice of their contents in their dealing with the company:

Held, also, that as the company's managing director by depositing the title-deeds impliedly represented that the company could give a valid first charge, the bank, though aware that debentures had been issued, were not put on inquiry, and were entitled to priority.

English and Scottish Mercantile Investment Co. v. *Brunton*, [1892] 2 Q. B. 700, and *In re Castell & Brown, Limited*, [1898] 1 Ch. 315, followed.

On March 17, 1900, the company issued a second mortgage debenture to the bank as a collateral security for an extended overdraft. This debenture was expressed to be subject to the first mortgage debentures:—

Held, that the bank did not thereby obtain notice of the terms of the first mortgage debentures so as to postpone their equitable mortgage in respect of subsequent advances.

SUMMONS to vary the master's certificate.

This was a summons to vary the master's certificate in a

debenture-holder's action, the question being whether an equitable mortgage by deposit of the company's title-deeds with their bank, the Devon and Cornwall Banking Company, Limited, took priority over first mortgage debentures precluding the creation of any prior charge.

In March, 1897, the company issued twenty first mortgage debentures, each securing 100*l.* and 5 per cent. interest. The company thereby charged, by way of floating security, all real and personal property then or at any time thereafter belonging to the company with the payment of the principal moneys and interest secured by the debentures. The debentures were issued subject to the conditions indorsed thereon. Condition 2 provided that, notwithstanding the charge thereby created, the company should be at liberty in the course of their business, and for the purpose of continuing and carrying on the same, to use, employ, sell, or otherwise deal with all or any part of the said property until default should be made as therein mentioned (including default in payment of interest). Condition 4 provided that nothing therein contained should be taken to authorize the creation of any mortgage or charge of or upon the said property or any part thereof having priority over the charge created by the debentures of that series.

On November 26, 1898, the company were indebted to the bank in respect of their overdrawn account in the sum of 250*l.*, and an intimation was given by the bank to the company that the bank would be unable to honour any further cheques of the company unless the company gave security for the then present and future overdraft. On the same day Garland, the managing director of the company, took to the bank manager a packet of deeds, forming the company's title-deeds to their premises, and obtained a receipt for them in the following form:—

"Thos. Garland, Esq., Manager, Valletort Sanitary Steam Laundry Company, Limited.

"Dear Sir,—I beg, as requested, to hand you annexed list of the six deeds and documents deposited here by you to-day as

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security, in consideration of the present and future occasional overdraft of the banking account of your company.

"Yours faithfully,

"T. Waldo How, Manager.

"Devon and Cornwall Bank,
Stonehouse, Plymouth,
Nov. 26, 1898."

The deposit having been made, the bank granted the company a further extension of the limit. Garland stated that at the time of making the deposit it was not present to his mind that condition 4 prohibited any mortgage or charge in priority to the debentures. The bank manager stated that although he knew debentures had been issued by the company, four of them having been deposited with the bank by a customer, Mrs. Garland, the wife of the managing director of the company, to secure her private account, yet he did not know, and, so far as he was aware, no officer of the bank had any notice or knowledge, that the conditions prohibited the company from creating any mortgage or charge in priority thereto. He made no inquiry in the matter. Mrs. Garland's debentures were in the possession of the bank at the time of the deposit.

In February, 1900, the managing director of the company applied to the bank for a further extension of their overdraft up to 500*l.* The bank at first refused, but ultimately allowed the extension on receiving a second mortgage debenture of 500*l.* by way of collateral security. By this debenture, dated March 17, 1900, the company charged their undertaking and all their property present and future, including their uncalled capital for the time being, with the payment of 500*l.* and 5 per cent. interest. The first condition provided as follows: "This debenture is to secure the principal sum of 500*l.* This debenture is to rank as a second charge on the property expressed to be charged, namely, next after such of the mortgage debentures issued by the company in the year 1896 (1) as shall for the time being be outstanding, and such charge is to be a specific charge as regards the company's lands, leaseholds, goodwill, and uncalled

(1) *Sic.*

capital, and a floating security as regards the company's other assets."

At the date of the issue of this collateral security the overdraft was 366*l.* On June 30, 1902, the overdraft was 536*l.* It was entirely due to debits since March 17, 1900, the overdraft at that date having been discharged by subsequent credits.

On July 18, 1902, the debenture interest being in arrear, the plaintiff, a first mortgage debenture-holder, suing on behalf of herself and all other first mortgage debenture-holders, obtained the usual judgment declaring that the debenture-holders were entitled to a charge, ordering accounts and inquiries, and appointing a receiver.

By his certificate dated April 8, 1903, the master certified that the bank were entitled to a charge for 536*l.* with interest at 5 per cent. from June 30, 1902, in priority to the first mortgage debenture-holders. The plaintiff now sought to vary the certificate by disallowing the priority of the bank.

Maugham, for the plaintiff. (1.) As the bank held four debentures at the time of the deposit of title-deeds, they were affected with notice of condition 4.

(2.) They ought at least to have asked Garland whether the debentures affected the property and precluded the creation of a prior charge, in which case a negative answer would have protected them: *Jones* v. *Smith* (1); *English and Scottish Mercantile Investment Co.* v. *Brunton* (2); but with the exception of certain dicta of Lord Esher M.R. and Bowen L.J. in the latter case, there is no authority that they could be protected in the absence of such an inquiry and answer.

(3.) They were, at all events, affected with notice of condition 4 on March 17, 1900, when they took a second mortgage debenture, which, being expressly subject to the first mortgage debentures, shewed that they formed part of the chain of title and affected the property. In that case notice of a deed is notice of its contents, notwithstanding any representation in respect thereof: *Patman* v. *Harland*. (3) From that date,

(1) (1843) 1 Ph. 244; 58 R. R. 22. (2) [1892] 2 Q. B. 700, 711, 715.
(3) (1881) 17 Ch. D. 353.

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therefore, further advances on the equitable mortgage were subject to the first mortgage debentures: *Hopkinson* v. *Rolt* (1); and as by the rule in *Clayton's Case* (2) the present overdraft is entirely due to advances since that date, the bank's charge is subject to the first mortgage debentures.

Eve, K.C., and *Mark Romer*, for the bank. (1.) The fact that the bank held debentures as security for one customer's account could not affect them with notice in their dealings with another customer.

(2.) The mere fact that the deeds were deposited with the bank was an implied representation that the company could give a valid first charge; and the bank were not put on inquiry: *In re Castell & Brown, Limited.* (3) If they had inquired they would have been told that the debentures did not affect their security, as Garland had forgotten condition 4.

(3.) There was no reason why the bank should inspect the first mortgage debentures on taking the second mortgage debenture, as they were content to take subject to them whatever their terms might be. They were certainly not put on inquiry as to their effect on the equitable mortgage, which was an entirely different transaction.

The bank, therefore, not having omitted any reasonable inquiry or inspection on either transaction, were not affected with notice: Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.

Maugham, in reply. In *In re Castell & Brown, Limited* (3), the bank had no notice of the existence of any debentures, and were consequently not put on inquiry.

If Garland had been asked about the debentures, he would probably have recollected condition 4, or would have referred to the debentures before answering.

The two transactions were closely connected.

Cur. adv. vult.

July 2. SWINFEN EADY J., after stating the facts up to and including the deposit of title-deeds, continued:—I am quite satisfied that the bank were in fact wholly ignorant of

(1) (1861) 9 H. L. C. 514. (2) (1816) 1 Mer. 572; 15 R. R. 161.
(3) [1898] 1 Ch. 315.

any condition contained in the debentures which would prevent the company making a valid deposit of title-deeds to secure the overdraft, and that the bank acted in perfect good faith in the matter. It was contended by the plaintiff that as four debentures had been deposited with the bank by Mrs. Garland, the bank must be deemed to have had actual notice of the condition. In my opinion this contention is not well founded. There is no rule of law that a banker in his dealings with each customer is to be deemed fixed with notice of the contents of every document deposited with him as security by every other customer. It was then contended that the bank ought to have inquired of Garland whether there was any stipulation in the debentures that no prior charge should be created, and that, as the bank made no such inquiry, their charge did not acquire priority; although, if they had asked the question and had been answered by Garland in the negative, their priority could not have been successfully attacked. Upon this point reference was made to *English and Scottish Mercantile Investment Co.* v. *Brunton* (1); and it was insisted that in order to prevent the bank being fixed with constructive notice of condition 4, it was essential that the bank should have been told that the debenture did not affect the property, or did not prevent the deposit of the title-deeds being made with the bank as proposed. In that case the language of Lord Lyndhurst in *Jones* v. *Smith* (2) was very carefully considered. He said: "Where a party has notice of a deed which does not necessarily—which may or may not—affect the property, and is told, that in fact it does not affect it but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true, there is no decision which goes the length of saying that if he is misled, he is fixed with notice of the instrument." In examining that passage Bowen L.J. said (3): "I do not feel convinced that, having regard to the class of property which is the subject-matter of this case, Lord Lyndhurst would necessarily have said that a person could

(1) [1892] 2 Q. B. 700. (2) 1 Ph. 244, 253, 254; 58 R. R. 22, 39, 40.
(3) [1892] 2 Q. B. 715.

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only escape from being fixed with constructive notice if he was told that the deed did not affect his right. I think it possible that he might escape if, in respect of a deed or debenture such as is in question here, he did not know or honestly think, and it was reasonable that he should not know or honestly think, that the instrument was one which must affect his right." Lord Esher M.R. in that case took the same view, and said (1): "I have a strong opinion that, even if the false statement that the debentures did not affect the plaintiff's title to the mortgage had never been made, the doctrine of constructive notice would not have applied." In the present case it was perfectly reasonable for the bank to think—and they might quite honestly think—that the debentures did not prevent the deposit being made with them. They certainly did not wilfully shut their eyes to prevent something coming to their knowledge. It was pointed out in *English and Scottish Mercantile Investment Co.* v. *Brunton* (2) that in two out of the three forms in which debentures are usually issued, the company are not prevented from creating a charge, having priority over the charge created by the debentures. If the debentures merely create a floating charge, and there is not any agreement by the company not to create any specific charge taking priority, then an equitable mortgage by deposit subsequent to the debentures takes priority: *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (3) In the present case, although the managing director did not in language state to the bank that the debentures did not affect the hereditaments comprised in the title-deeds, or prevent the company from making a valid deposit, he in fact deposited the deeds with the bank to secure the overdraft, and by such act represented that he had power to do so; he certainly thought he had that power, as he says that condition 4 was not present to his mind; and his action was facilitated by the title-deeds being left by the debenture-holders in the custody of the company. Condition 2 probably shews why the deeds were left in the possession of the company—namely, in order that the company

(1) [1892] 2 Q. B. 711. (2) [1892] 2 Q. B. 700.
(3) (1885) 29 Ch. D. 715.

might be at liberty to sell or otherwise deal with all or any part of their property in the course of their business and for the purpose of carrying on the same. Under these circumstances the observations of Romer J. in *In re Castell & Brown, Limited* (1), are directly applicable. He says: "I now look to see how it was that the company retained possession of the deeds notwithstanding the issue of the debentures. The reason appears to me obvious. The debentures were only intended to give what is called a floating charge, that is to say, it was intended, notwithstanding the debentures, that the company should have power, so long as it was a going concern, to deal with its property as absolute owner. And I infer it was on this account that the company was allowed to, and did, retain possession of the deeds. In other words, the debenture-holders, notwithstanding their charge, and indeed by its very terms, authorized their mortgagor, the company, to deal with its property as if it had not been incumbered, and left with their mortgagor the deeds in order to enable the company to act as owner. It is true that having given this general authority to the company, the debentures purported to put a certain special restriction on its exercise. By the first condition it was provided, that though the charge was to be a floating security, the company was not to be at liberty to create any mortgage or charge upon its freehold and leasehold hereditaments in priority to the debentures. This restriction was no doubt quite valid as a private arrangement between the company and the debenture-holders. But can the debenture-holders, under the circumstances, set it up as against the bank taking its security without notice? I think not. I take it to be established that if a first mortgagee, even though he has the legal estate, authorizes the mortgagor to retain the deeds in order that the mortgagor may thereby, as ostensible owner of the property, be able to deal with it though only to a limited extent, yet if the mortgagor takes advantage of the deeds so left with him to deal with the property to an extent beyond what was authorized, then the mortgagee cannot set up his charge as against an incumbrancer for value

(1) [1898] 1 Ch. 315, 321.

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without notice, who claims under the unauthorized dealing and relied on the deeds and the apparent ability of the owner to deal with the property free from incumbrances."

It has frequently been said that the doctrine of constructive notice is not to be extended, and, in my opinion, it would be extending it to hold that the bank were affected with notice and that their security was postponed to that of the debenture-holders. In my judgment the bank have a stronger equity than the debenture-holders, and are entitled to priority.

A further question arises upon what took place subsequently. [His Lordship stated the facts as to the issue of the second mortgage debenture of March 17, 1900, and continued:—]

It was contended that when the bank accepted this second debenture as collateral security they must be deemed to have notice of the first debentures, and of all their conditions; that the bank must be fixed with constructive notice at that date, that the company had no right to deposit their title-deeds to secure the overdraft so as to give a first charge to the bank; that, as the balance now due on the current account had arisen since March 17, 1900, the bank had not any valid charge on the deeds for the amount. In my opinion, the effect of the second transaction was not to affect the bank with constructive notice of the conditions of the first debentures (as to which I am satisfied that in fact they remained ignorant), so as to invalidate as from the date of the issue of the second debenture any further dealings on the footing of the equitable deposit. For the purpose of the second debenture or collateral security, the bank agreed (as appears from the terms of the second debenture) that the security thereby created was to rank after the outstanding first debentures. Whatever the terms of the first debentures might have been, the express contract was that the second debenture was to rank behind them. There is no reason why the bank should be affected (as regards the collateral security) with constructive notice of these terms, as, notice or not, they agreed to take the collateral security subject to the terms, whatever they might be.

The real object of the plaintiff, however, is to affect the bank as of March 17, 1900, with notice, in respect—not of that

transaction—but in respect of the previous transaction, the equitable deposit of title-deeds, so as to prevent any advance made after March 17, 1900, from ranking against the first debentures. The creation of that security was a different transaction, completed long before March 17, 1900, although there was an account current still running at and subsequent to that date. It was not unreasonable of the bank to abstain from making any inquiries as to the amount of the first debentures then outstanding, or as to their terms, seeing that, whatever the amount or terms, the bank was taking subject to them—taking only such collateral security as the company could give. The form of s. 3 of the Conveyancing Act, 1882, shews that a restriction rather than an extension of the old doctrine of constructive notice was intended. In my opinion the bank were not, by reason of the second transaction, the collateral security, affected with constructive notice as of March 17, 1900, so as to invalidate any dealings made after that date upon the footing that the security created by the first transaction still remained valid and entitled to priority over the first debentures. The result is that the summons to vary must be dismissed with costs.

Solicitors: *Busk, Mellor & Norris, for Albert Gard & Co., Devonport; Rowcliffes, Rawle & Co., for Prance & Prance, Plymouth.*

G. R. A.

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July 4.

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[1902 W. 712.]

Equitable Waste—Ornamental Timber—"Planted or left for Ornament or Shelter"—Evidence—Injunction.

In an action to restrain the cutting of timber on the ground of equitable waste, the question to be decided is whether the timber was in fact planted or left for ornament or shelter, not whether it is ornamental or useful for shelter; but the Court will accept the evidence of competent persons, founded on inference from the present appearance and condition of the timber, as some evidence that it was so planted or left.

By a settlement dated September 11, 1869, the Lulworth Castle estate was limited to uses under which, at the date of this action, Reginald Joseph Weld was tenant for life in possession, without impeachment of waste. He had come into possession in 1877, but was a person of unsound mind so found by inquisition, and the estate was managed by his committees.

In February, 1902, the committees put up a number of timber trees for sale by auction.

The plaintiff was a tenant for life under the settlement in remainder expectant on certain estates for life limited after the life estate of R. J. Weld to persons who had not and were not likely to have issue, and estates tail limited to their children. He was also in occupation of Lulworth Castle and a considerable part of the settled estates as tenant. The plaintiff brought this action against the committees, and a firm of auctioneers employed by them, for an injunction to restrain the cutting of the timber on the ground that it was ornamental and required for the shelter of the castle and the growing timber on the estate.

On October 27, 1902, an order was made in the action referring to a special referee for inquiry and report the question, "Which of the trees on the Lulworth Castle estate marked by the defendants for felling, being 540 in number or

thereabouts, may properly be felled by the defendants, and which of the said trees ought properly to be left standing?"

At the hearing of the inquiry before the referee the plaintiff called one witness only, an expert in forestry, who stated that it was impossible, looking at the park and the situation of the castle, not to come to the conclusion that the woods, in which the trees in question were, were laid out with the object of forming a very beautiful park, and that they were very judiciously laid out, especially when taken in conjunction with other woods not the subject of the inquiry, but which also surrounded the park, for shelter belts.

The trees proposed to be cut consisted of oak, beech, and larch; the witness estimated the age of the oaks at about 150 years, the beech about the same but rather younger, the larch at about forty years. He was convinced that all the timber had been planted for ornamental purposes or shelter, and as part of one great scheme, though probably at different times. He stated that woods called Kennel Rings and the pleasure-ground by the lake were planted as part of one scheme to shelter the park and castle, and that a wood called Kennel Wood was younger than the rest, and was probably planted later when they found they wanted more shelter. His opinion was formed from looking at the woods from the top of the castle and in detail; he had no information as to the actual planting. Some of the woods had been severely and, he considered, injudiciously thinned.

After this witness had given his evidence, the plaintiff's counsel closed his case. The defendants' counsel then submitted that there was no evidence that any of the timber had been planted or left by the settlor for the purpose of ornament or shelter.

The referee then stated a special case under s. 19 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), submitting for the opinion of the Court the question whether any evidence had been given upon which, in the absence of any evidence on behalf of the defendants, he could properly find and report that any of the said 540 trees were such as might not properly be felled by the defendants.

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Neville, K.C., and *Barnard Lailey*, for the defendants. We submit that there is no evidence which goes to the point which the Court must decide before it will interfere with the legal rights of the tenant for life. The evidence tendered is merely that an expert considers the trees ornamental and useful for shelter, and infers that they were planted or left for ornament or shelter. That is not enough. The rule as laid down by Lord Eldon in the *Marquis of Downshire* v. *Lady Sandys* (1) and *Wombwell* v. *Belasyse* (2) is that there must be evidence that the timber was planted or left for ornament or shelter by the settlor or some one who, being absolute owner of the estate, has powers to bind the limited owners who follow. The same rule is laid down in *Marker* v. *Marker* (3) and *Halliwell* v. *Phillips*. (4) In the latter case Wood V.-C. says there must be a clear act of dedication. In the absence of dedication the Court will not interfere, but will leave the matter to the discretion of the successive owners, to whom the settlor has given a discretion by making them unimpeachable for waste: see Vaizey on Settlements, vol. ii. p. 900; *Chamberlayne* v. *Dummer*. (5)

In this case there is evidence that more timber has been cut than was necessary for thinning, and that negatives any dedication.

Eve, K.C., and *O. L. Clare*, for the plaintiff. The mere opinion of an expert that certain timber was ornamental would not be enough. But actual direct evidence of the planting or leaving the trees can rarely, if ever, be obtained. It must be, and has been in all the cases, established by inference drawn from the facts and appearance, as they exist at the time at which the Court is asked to interfere, examined by persons accustomed to such matters: *Lushington* v. *Boldero*. (6)

Neville, K.C., in reply. In *Lushington* v. *Boldero* (6) the Court ordered an inquiry whether timber had been planted or

(1) (1801) 6 Ves. 107.
(2) (1825) 6 Ves. (2nd ed.) 110 a, note.
(3) (1851) 9 Hare, 1, 17.
(4) (1858) 4 Jur. (N.S.) 607.
(5) (1782) 1 Bro. C. C. 166; (1792) 3 Bro. C. C. 549.
(6) (1819) 6 Madd. 149; 22 R. R. 261.

left for ornament or shelter. There is nothing to shew what evidence was admitted.

[SWINFEN EADY J. referred to the judgment of Turner L.J. in *Micklethwait* v. *Micklethwait*. (1)]

All that the Lord Justice says in that case is founded on the judgments of Lord Eldon in the cases cited above. If inference of this kind is sufficient evidence, no tenant for life could ever cut down a tree. There must be some evidence of the settlor's intention.

SWINFEN EADY J. This is a special case, and the question submitted for the opinion of the Court is whether any evidence has been given before the special referee upon which, in the absence of any evidence on behalf of the defendants, he can properly find and report that any of the 540 trees are such as might not properly be felled by the defendants. The issue sent to the referee was entirely a question of fact; and, having heard the evidence of one side, he has submitted to the Court, as a question of law, whether there is any case whatever for the defendants to answer. I am told that the reference was made to the special referee by reason of his own great experience in forestry and timber, and that, in company with representatives from either side, he has viewed the woods and lands in question. But the special case does not contain any reference to the view. The sole point submitted is whether, on the plaintiff's evidence, there is anything for the defendants to answer.

Now it has often been said that the question whether trees have been planted or left standing for shelter or ornament is entirely a question of fact, but the main difficulty lies in the evidence necessary to establish the fact, and the Court no doubt has often considerable difficulty in determining whether trees have been planted or left standing for shelter or ornament. It may be that, if trees are in the neighbourhood of a mansion-house, that affords some indication; but trees at a considerable distance have been preserved—it is not necessary that they should be near a mansion-house, or that they should

(1) (1857) 1 De G. & J. 504.

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be in or near a park or anything of that kind. The case made by counsel for the defendants is that there must be some evidence of some act or intention on the part of the settlor to treat these trees as ornaments, or something to shew that he considered that they had been planted for ornament or for shelter, or that the settlor intended to leave them for ornament or shelter.

Now certainly there is evidence called on behalf of the plaintiff to shew that in the opinion of his witness some of the trees were designedly planted for shelter. With regard to the Kennel Rings and the pleasure-grounds near the lake he said: "I think the Kennel Rings and the woods there were planted as part of the one scheme to shelter the amphitheatre in which the lake and castle are." And then in answer to a question, "Do you mean for residential purposes?" he says, "Yes, for residential purposes." Then he speaks of the great use they are for shelter and protection. With regard to the Kennel Wood, his view was that it was planted later when they found they wanted more shelter. Now the trees in question are of various ages. Some of the oaks are 150 years old or more. Some larches were said to have been planted something like forty years ago, which would bring it to shortly before September 11, 1869, the date of the settlement under which the parties in this action claim, and it may very well be that, taking the Kennel Wood as an illustration, that was a belt of wood possibly, having regard to its age, expressly planted by the settlor, or, if not, certainly left standing by him for the purpose of shelter.

It was urged that the way in which some of the woods have been treated, and especially the very extensive thinning that has taken place in the Bowling Green Wood, afforded a very good indication that the settlor himself did not treat this timber as ornamental timber, but as timber to be dealt with for ordinary commercial purposes, for repairs on the estate, or for selling. But although thinning appears to have been extensively resorted to in the Bowling Green Wood, I do not find the same evidence with regard to all the other parts of the property, and I do find with regard to some part of it that

drives have been cut through it, although it is true that some of these, even if originally drives, are overgrown, and are certainly not adapted at the present time for that purpose, but are mere bridle-paths or game-paths.

In my opinion there is quite sufficient in the evidence that has been adduced on behalf of the plaintiff to call for an answer on the part of the defendants. It may well be that the plaintiff's evidence does not go to all the trees, but, if it goes to any part of the case made by him, if his evidence is sufficient to sustain his claim with regard to any part of the case, there can only be one answer to the special case.

The observations of Turner L.J. in *Micklethwait* v. *Micklethwait* (1) seem to me to have a considerable bearing on the present case. He said there: "If by his disposition or by his acts he"—the settlor—"has indicated an intention that there should be a continuous enjoyment in succession of that which he has himself enjoyed, in the state in which he has himself enjoyed it, it must surely be against conscience that a tenant for life, claiming under his disposition, should, by the exercise of a legal power, defeat that intention. We have here, I think, the clue by which the difficulty of this case can be solved. If a devisor or settlor occupies a mansion-house with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed. This Court, therefore, in such a case protects the trees against the acts of the tenant for life."

I quite accept the argument which was put forward on behalf of the defendants—that although the issue is ultimately for the Court to determine whether the timber has or has not been left for shelter or ornament, that issue is not determined by saying whether in the opinion of the Court the timber is ornamental or not. That is not the issue. If the timber has been planted or left by the owners of the estate for the time

(1) 1 De G. & J. 524.

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being for shelter or for ornament, that is protected under the rule which protects ornamental timber, even though the opinion of persons at the present day may be that the timber in its position is not in fact ornamental; but, according to the evidence which is adduced on behalf of the plaintiff, this timber, or some of the timber in question, is not only suitable for shelter and acts as shelter, but was planted and left for that purpose. Under those circumstances, I am of opinion that the way in which the special case ought to be answered is in the affirmative.

Solicitors: *Eland, Nettleship & Butt; Stanley J. Attenborough.*

J. R. B.

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July 8, 9, 10, 18.

In re DENTON'S ESTATE. LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON.

[1902 D. 1350.]

Principal and Surety—Insurance of Securities—Policy of Insurance of Mortgage Debt—Contract whether of Insurance or Suretyship—Co-sureties—Covenant by Surety to pay whole Debt with a Limit to Liability—Contribution—Proportion.

H. mortgaged a leasehold public-house by demise to a bank for 4000*l*. The mortgage deed contained a joint and several covenant by H. and a surety to pay principal and interest, with a proviso that the liability of the surety should be limited to 1000*l*. The deed also contained a covenant by H. alone to insure the mortgage debt and interest with the plaintiff company in the name of the bank. An insurance was accordingly effected with the plaintiff company by a document called a policy, whereby the company agreed that if the mortgagor made default the company would pay the principal and interest; and it was provided that thereupon the bank (therein called the insured) should assign the mortgage debt and all securities to the company, and do all things necessary for the purpose of enforcing any rights or remedies, or of obtaining relief or indemnity from other parties to which the company should be subrogated upon payment under the policy. The mortgagor made default; the company paid the mortgage debt, interest, and costs, and moneys expended in preservation of the property, amounting in all to nearly 5000*l*. They realized 4000*l*. from the security. The surety had died before the security was realized.

The company brought this action against his legal personal representatives to recover the whole balance:—

Held, that the contract of the company with the bank was one of suretyship and not of insurance; but that whether the contract were one of suretyship or insurance, the company and the surety were in the position of persons under a common liability arising in the same transaction which had been paid by one of them. They were therefore liable to contribute in proportion to the amounts for which they were respectively liable—namely, the surety one-sixth and the company five-sixths of the loss.

By an indenture of mortgage dated November 2, 1899, and made between Maude Hannay, spinster, thereinafter called the mortgagor, of the first part, George Denton of the second part, and the London City and Midland Bank of the third part, the mortgagor demised a leasehold public-house known as the Lord Palmerston at Highgate to the bank for the term of years for which she held the same, except the last day, by way of mortgage to secure the repayment of 4000*l.* advanced to her by the bank and interest.

The mortgagor and the said George Denton jointly and severally covenanted with the said bank that the mortgagor and the said George Denton or one of them would pay to the said bank upon demand by them left at the said messuage or tenement called the Lord Palmerston the said sum of 4000*l.*, with interest at the rate of 1 per cent. above the current Bank of England rate, but not less than 4*l.* 10*s.* per cent. per annum, and also all such further sums as should for the time being be due from the mortgagor to the said bank, for money thereafter to be advanced to or for the use of the mortgagor, or paid on her behalf for rent, rates, taxes, repairs, licences, or insurances, or for any other matter or thing in respect of the premises thereby demised, with interest at the rate aforesaid. The mortgage deed contained a proviso and covenant by the mortgagor "that the said G. Denton shall not be liable under the covenant lastly hereinbefore contained to pay a larger sum in the whole in respect of the principal money and interest taken together than the sum of 1000*l.* with interest on such sum at the rate aforesaid from the time of demand of payment being made on the said G. Denton until payment. And the

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mortgagor doth hereby also covenant with the said bank that she will insure, and at all times during the continuance of this security keep insured, the principal moneys and interest hereby secured against loss in the name of the said bank with the Licenses Insurance Corporation and Guarantee Fund, Limited." The covenant continued in the usual form for payment of premiums and production of receipts, with power to the mortgagees to pay premiums, a covenant for their repayment on demand, and power to add them to the security. The mortgage deed also contained a power of attorney and other clauses for dealing with the licence usual in public-house mortgages, and a proviso, "That although as between the mortgagor and the said G. Denton, the said G. Denton is only surety for the mortgagor, yet as between the said G. Denton and the said bank the said G. Denton shall be considered as a principal debtor to the extent aforesaid for all moneys now advanced or hereafter to be advanced and interest thereon, and for all damages for breach of the covenants hereinbefore contained, so that the said G. Denton shall not be released by time being given to the mortgagor or by any other variation in the provisions of these presents, or anything whatsoever whereby the said G. Denton as a surety only would have been so released."

Five days before the date of the mortgage the mortgagor had sent in to the plaintiffs a proposal in writing for insuring the said mortgage debt for 4000*l.* and interest, in which it was stated that Mr. G. Denton would join in the mortgage for the purpose of guaranteeing the repayment of 1000*l.* of the principal money.

By a document dated March 7, 1900, headed "Mortgage Insurance Policy," after reciting that the London City and Midland Bank, thereinafter called the insured, was entitled to a sum of 4000*l.*, payment of which with interest at the minimum rate of 4½ per cent. per annum was secured by the said mortgage dated November 2, 1899, and that the insured had delivered to the plaintiff corporation a proposal in writing for guaranteeing the said mortgage debt and interest, which proposal contained full particulars of the said mortgage and was deemed to be incorporated in the policy, and that it was

agreed that the said proposal should be the basis of the contract of insurance thereby intended, and reciting that the first premium had been paid, it was witnessed "that the corporation agree with the insured (subject to the conditions at the back hereof, which are to be taken as part of this policy) that if the insured shall become entitled, under the power of sale conferred by the said mortgage deed or otherwise, to sell the mortgaged property, and shall give notice in writing thereof to the corporation while this policy is in force, the corporation will, after the expiration of six calendar months from the receipt by the corporation of a claim in writing from the insured requiring payment, pay to the insured the principal money for the time being due under the said mortgage, with any interest thereon at the minimum rate which would have been or be payable if the interest were punctually paid under the said mortgage for any period not exceeding twelve calendar months preceding the date of the receipt of the claim."

The conditions on the back of the policy affecting the points raised in the present case were as follows:—

Clauses 1 and 7 empowered the corporation by giving six months' notice to require the insured to transfer to them the mortgage debt and interest and all securities for the same upon payment of the amount due for principal, interest, and costs, and within three months after the receipt of a claim under the policy to require the insured to realize the security as their agent and on their behalf.

"8. If at the time a claim is made under this policy there be any other subsisting insurance or insurances, whether effected by the insured or any other person insuring the same interest in the mortgaged property, the corporation shall not be liable to pay or contribute more than their rateable proportion.

"9. Upon payment of the amount which may become payable under this policy the assured shall assign or transfer to the corporation or their nominee or nominees the mortgage debt and interest and all securities held by the insured for the same.

"10. The insured and any claimant under this policy shall at the expense of the corporation do and concur in doing all

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such acts and things as may be necessary or reasonably required by the corporation for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the corporation shall be or would become entitled or subrogated upon payment under this policy, whether such acts and things shall be or become necessary or required before or after payment by the corporation."

The mortgagor made default in payment of interest; and on November 8, 1900, the bank demanded payment of principal, and on the same day served on the plaintiffs a notice that they had become entitled to exercise the power of sale, and demanded payment of the principal and interest under the policy. On November 13, 1900, the bank served a notice on the defendant Judith Lottie Denton, who was the sole executrix of George Denton, deceased, demanding payment of 1000*l.* out of his estate under his covenant. Proceedings were taken by the bank against the mortgagor, but only a small sum was recovered. The bank pressed the plaintiffs for payment, and on August 3, 1901, the plaintiffs placed on deposit at the bank a sum of 4000*l.* pending realization of the security. Ultimately the property was sold for 4000*l.*, and the balance paid by the plaintiffs to the bank for principal and interest after allowing for interest on the deposit was only 18*l.* 2*s.* 8*d.*; but the plaintiffs had expended in doing repairs made necessary by notices from the lessors and the local authority, and otherwise in necessary expenses of realization, 966*l.* 10*s.* 10*d.*

The plaintiffs commenced this action by originating summons, asking for a declaration that the plaintiffs were, under or by virtue of the covenant contained in the mortgage, creditors of the estate of the said George Denton for the whole sum of 984*l.* 12*s.* 6*d.* The summons was transferred to the witness list, and now came on for hearing.

Everitt, K.C., and *Owen Thompson*, for the plaintiffs. The plaintiff corporation are transferees of the mortgage, and as such are entitled to all that the mortgagees were entitled to, i.e., to the property, the benefit of the mortgagor's covenant, and the benefit of the surety's covenant. The contract of the

corporation is one of underwriting, not suretyship: *Dane* v. *Mortgage Insurance Corporation.* (1) Even if the corporation are sureties at all, they are only sureties for both principal debtor and surety—that is, they are only liable in the default of both of them; they are not co-sureties or liable to contribution: *Craythorne* v. *Swinburne.* (2) Again, the assurance by the policy and the suretyship of Denton were wholly distinct transactions, and there is no contribution even between sureties unless they are co-sureties in the same transaction. (3)

[SWINFEN EADY J. In the present case there is a covenant in the mortgage to effect the policy.]

There is no stipulation by the surety to that effect, and the policy does not mention the surety; they were clearly distinct transactions.

The contract is one of guarantee against loss. If the mortgagees were paid in full they could recover nothing on the policy, and the insurers are entitled to subrogation in respect of all their remedies. *Dane* v. *Mortgage Insurance Corporation* (1) was followed in *Finlay* v. *Mexican Investment Corporation.* (4)

Eve, K.C., and *J. Henderson*, for the executors. The question is purely one of construction of the bargain between the parties. In the proposal for insurance, which is made the basis of the contract, it is stated that Denton was to be a surety. It is plain that the guarantees in the policy and by Denton were part of one transaction. There is no magic in the word policy: *Seaton* v. *Heath.* (5) In substance there is no difference between the liability of the corporation under the policy and that of the surety under the covenant, except that the corporation were to have six months' notice, and were given express power to realize the security; and the surety if he had paid would have had a right to have the security realized. In *Dane* v. *Mortgage Insurance Corporation* (1) Kay L.J. said that even if the contract had been one of suretyship he was

(1) [1894] 1 Q. B. 54, 60.
(2) (1807) 14 Ves. 160; 9 R. R. 264.
(3) *Coope* v. *Twynam*, (1823) T. & R. 426; 24 R. R. 89.
(4) [1897] 1 Q. B. 517.
(5) [1899] 1 Q. B. 782, 792.

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not sure that the surety would have been released. The distinction is not so wide as it is attempted to make out. *Ellesmere Brewery Co.* v. *Cooper* (1) is an authority that where persons are sureties for the same sum, under the same contract, they are liable to contribution, though they may be liable under different instruments and for different sums. In this case, except that the plaintiffs' instrument is labelled "Policy," their liability is of precisely the same nature as Denton's. It is a guarantee contained in a covenant to pay principal and interest; the only difference is that Denton's liability is limited.

Ellis v. *Emmanuel* (2) shews the important distinction which exists between becoming surety for a limited part of a debt and becoming surety for the whole debt with a limit on liability; but it also shews that this distinction makes no difference to the question of contribution. There must in all cases of co-sureties be proportionable equality of the burden and of the benefit: *Steel* v. *Dixon*. (3) The proportion is that which the sums for which such surety is liable respectively bear to each other. In this case the plaintiffs are liable for 5000*l.*, and Denton's estate is liable for 1000*l.*; his estate, therefore, will pay one-sixth and the plaintiffs five-sixths of the amount payable.

Everitt, K.C., in reply. There is no co-suretyship. None of the incidents of a common suretyship were present or intended by the parties.

Cur. adv. vult.

July 18. SWINFEN EADY J. (after stating the facts). It will be observed that the issue of the policy by the corporation and the joinder of George Denton as surety in the mortgage were not separate and distinct transactions, but the same transaction divided into different parts. Each of them, the corporation and Denton, acted with the privity of the other. In the proposal in writing referred to in the policy as the basis of the contract, it is stated that Mr. Denton will join in

(1) [1896] 1 Q. B. 75. (2) (1876) 1 Ex. D. 157.
(3) (1881) 17 Ch. D. 825.

the mortgage for the purpose of guaranteeing the repayment of 1000*l.* of the principal money. In the mortgage, to which Denton is a party, the mortgagor covenanted to insure and keep insured the principal moneys and interest against loss in the name of the bank with the corporation.

The corporation and Denton were thus bound for the same principal and by the same engagement, although Denton's liability was restricted to 1000*l.* and interest. At one time it was contended on behalf of the corporation that their engagement was different from Denton's, as the corporation were only liable for the principal moneys originally advanced on the mortgage (4000*l.*) with interest, while Denton was liable for further advances and for money paid by the mortgagees on behalf of the mortgagor for rent, rates, taxes, repairs, licences, and insurances, but the liability of the corporation under the policy is to pay "the principal money for the time being due under the said mortgage," and is not limited to so much of the original principal sum of 4000*l.* as remains unpaid. In order to ascertain the amount of "the principal money for the time being due under the said mortgage," reference must be had to the deed, which determines what sum the mortgagee is entitled to claim as principal. By clause 9 of the conditions, upon payment of the amount which may become payable under the policy, the insured is to transfer to the corporation the mortgage debt and interest and all securities: this means the whole of the mortgage debt, and not merely so much thereof as may represent principal money originally advanced with interest thereon. Indeed, if the contention of the corporation had been well founded in this respect, and they were only bound to pay, and thereupon entitled to have transferred to them, so much of the original mortgage debt and interest as remained unpaid, their claim to prove against Denton's estate would immediately have failed, except as regards 18*l.* 2*s.* 8*d.*, as this latter sum is the only amount they have actually paid for either principal or interest in respect of the original advance of 4000*l.*, the mortgage premises having realized by sale the sum of 4000*l.*

I treat the corporation, therefore, as bound by the same

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engagement as Denton, and I treat the sums properly paid by the corporation for rent, costs, repairs, and otherwise as covered by their policy. If these sums had been paid by the bank, the bank could have deducted these sums from the 4000*l.* proceeds of sale, and left a corresponding deficiency in the principal moneys, which the corporation would have been liable to pay. These various sums appear to have been in fact paid by the corporation direct, and not by the bank in the first instance and then repaid by the corporation; but this is mere form, as the payments were certainly made by the corporation by reason of their liability under the policy, and to assist in realizing the property to the best advantage so as to diminish as far as possible the ultimate loss.

Under these circumstances the question is, What are the respective rights of the parties? The corporation claim that they are not in the position of sureties or co-sureties, but are entitled as transferees of the bank to throw the whole of the loss upon Denton's estate as it does not exceed 1000*l.* and interest, which is the limit of his liability.

In my opinion this cannot be sustained. Denton was a surety only, and could with equal or perhaps greater force have claimed that upon payment of the deficiency he would have become by operation of law entitled to enforce all the rights of the bank, including the right to proceed against the corporation under the policy for the full extent of the deficiency.

In the absence of any express contract as between the corporation and Denton with regard to the incidence of any loss, I am of opinion that their position is that of persons subject to a common burden or liability which has been discharged by one of them. That one is entitled in equity to enforce contribution from the other upon the principle established and expounded in *Dering* v. *Earl of Winchelsea*. (1) It was contended that the corporation were not in the position of sureties strictly and properly so called. I am not satisfied that this contention is well founded. The policy contains a recital of a proposal for guaranteeing the said mortgage debt and

(1) (1787) 1 Cox, 318; 1 R. R. 41.

interest, and then it provides that if the insured shall become entitled to sell the mortgage property—that is, if the mortgagor shall make default in payment on demand of the principal money and interest—the corporation will, after six months' notice, pay the principal money and interest to the mortgagee. In other words, if the principal does not pay, the corporation will pay. It was urged by the corporation that they were merely in the position of persons insuring against a loss; but this argument is founded on their instrument, being headed "Mortgage Insurance Policy," and without regard to the terms of the instrument itself. It is not merely an insurance against loss. The corporation is liable, after the expiration of six months from default, to pay the full principal and interest, if the mortgagor does not, and even although there may not ultimately be any loss whatever on the mortgage. After transfer the corporation may ultimately realize from the security the full amount of principal, interest, and costs, and, instead of there being any loss, there may ultimately be a surplus for the mortgagor. The corporation may, under condition 7, require the insured to realize the securities, but they may not be capable of immediate realization; the corporation is liable to pay the full amount irrespective of the securities being realized or being insufficient. The policy is in a different form from that considered in *Dane* v. *Mortgage Insurance Corporation*. (1) But whether the contract of the corporation is a contract of insurance or a contract of suretyship does not seem to me to be material. The corporation and Denton were subject to a common burden or liability to which they must respectively contribute.

The question then remains, In what proportion are they to do this?

In *Pendlebury* v. *Walker* (2) Alderson B. expressly states the rule thus: "Where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and

(1) [1894] 1 Q. B. 55. (2) (1841) 4 Y. & C. Ex. 424, 441; 54 R. R. 499.

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if not equally, then proportionably to the amount for which each is a surety." In *Steel* v. *Dixon* (1) Fry J. cites the passage which I have just quoted with approval. And in *In re Arcedeckne* (2) Pearson J. also adopts the same view. Now in *Ellesmere Brewery Co.* v. *Cooper* (3) Lord Russell applied that principle to a case in which persons were jointly and severally bound in the same sum, but with a limit of their liability. It is true that in the end, as a result of the judgment, he found that the sureties were not under any liability, but he had to concede the principle with the view of arriving at the decision at which he did.

I am of opinion that the principle there laid down is to be applied in the present case, and that the proportion in which the corporation and Denton's estate are liable to contribute is that of the amounts for which they were respectively liable —that is to say, the proportion which the full amount due under the mortgage bears to 1000*l.*, the proportion in which 4000*l.*, together with the sum actually owing to the corporation for costs, bears to the 1000*l.*, which was the limit of Denton's liability.

[It was stated that the whole sum for which the corporation was liable was, roughly speaking, 1000*l.* in addition to the 4000*l.* realized by the sale, and the judge said that in that case the corporation must pay five-sixths and Denton's estate one-sixth. The corporation were ordered to pay the costs subsequent to the adjournment to the judge, and to add their prior costs to their security.]

Solicitors: *Jennings, Son & Allen; Loxley, Elam & Gardner.*

(1) 17 Ch. D. 825, 830. (2) (1883) 24 Ch. D. 709, 714.
(3) [1896] 1 Q. B. 75.

J. R. B.

In re LISKEARD AND CARADON RAILWAY COMPANY.

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July 14, 28.

Railway—Receiver—Rolling Stock—Proceeds of Sale — Debenture-holders — Priority—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 4, 23.

Rolling stock and other chattels of an insolvent railway company were sold to another railway company under the provisions of a statutory agreement which directed the proceeds of sale to be paid to a receiver already appointed under s. 4 of the Railway Companies Act, 1867, and gave the purchasing company the exclusive right of working the insolvent company's railway for ten years on certain terms :—

Held, that the proceeds of sale constituted money received by the receiver within the meaning of s. 4, and the holders of mortgage debentures charging the undertaking were therefore entitled to those proceeds under s. 23 in priority to unsecured creditors.

Yorkshire Railway Wagon Co. v. *Maclure*, (1882) 21 Ch. D. 309, 314, and *In re Hull, Barnsley and West Riding Junction Ry. Co.*, (1888) 40 Ch. D. 119, 130, applied.

PETITION.

The Liskeard and Caradon Railway Company, hereinafter called the Caradon Company, was incorporated by a special Act of 1843 (6 & 7 Vict. c. xliii.) with limited powers of borrowing.

The borrowing powers were extended by the Liskeard and Caradon Railway Act, 1860 (23 & 24 Vict. c. xx.), which incorporated the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and the company having paid off all previous loans borrowed 10,000*l.* on first mortgage debentures under the provisions of this Act.

Each debenture was in the common form given in Sched. C. to the Companies Clauses Consolidation Act, 1845, the Caradon Company thereby assigning the undertaking and all the tolls and sums of money arising by virtue of the special Act to the debenture-holder until the amount of the debenture was paid.

The borrowing powers were again extended by the Liskeard and Caradon Railway Act, 1882 (45 & 46 Vict. c. cxi.), and the Caradon Company borrowed 4000*l.* on second mortgage debentures in the same form.

By an agreement dated May 9, 1884, and made between the

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Liskeard and Looe Railway Company, hereinafter called the Looe Company, of the one part, and the Caradon Company of the other part, scheduled to and confirmed by the Liskeard and Caradon Railway Act, 1884 (47 & 48 Vict. c. cxcv.), it was agreed that the Caradon Company should have the exclusive right of working the Looe Company's railway for thirty years from January 1, 1888, and should work it continuously and vigorously with sufficient clerks and staff, stations, engines, rolling stock, and all other necessary works, machinery, and appliances, the Caradon Company paying the Looe Company 50 per cent. of the gross earnings after deducting 1000*l.* a year, with a minimum yearly payment of 1650*l.*

The Caradon Company became insolvent in 1885, and on October 13, 1886, an order was made under the Railway Companies Act, 1867, s. 4, appointing the petitioner, a judgment creditor, receiver of the general undertaking of the Caradon Company and the works and property comprised in that general undertaking or connected therewith, and to receive the tolls and sums of money arising out of that general undertaking.

By the Liskeard and Looe Railway Extension Act, 1895 (58 & 59 Vict. c. cviii.), the agreement of 1884 was annulled as from the date of the completion and opening for the public conveyance of passengers of Railway No. 1 authorized by the Act, and a new scheduled agreement was confirmed.

By this agreement dated March 2, 1895, and made between the Looe Company of the first part, the Caradon Company of the second part, and its receiver of the third part, after reciting (inter alia) the appointment of the receiver, it was agreed that as soon as Extension Railway No. 1 of the Looe Company was ready to be opened for the public conveyance of passengers, provided one calendar month's previous notice of the date was given to the Caradon Company and its receiver, the Caradon Company and its receiver would at the expiration of the notice deliver up possession of the Looe Company's railway and all the works and conveniences belonging thereto, and the Caradon Company should deliver over to the Looe Company all the rolling stock, including engines belonging to

the Caradon Company, and all the loose materials for permanent way, and all machinery, tools, and utensils in the workshops occupied by the Caradon Company and used and useful for the purpose of working the Looe Company's railway; and the Looe Company should thereupon pay to the receiver of the Caradon Company the fair value of such rolling stock, engines, materials, machinery, tools, and utensils, the value in case of difference to be determined by arbitration in manner thereinafter mentioned; and as from the date on which possession of the Looe Company's railway and the Caradon Company's rolling stock and other articles aforesaid should be delivered up to the Looe Company, the Looe Company should have the exclusive right of working the Caradon Company's railway for a period of ten years, paying to the Caradon Company the receipts attributable to their railway after making the deductions therein mentioned.

On April 25, 1901, the Looe Company, having given the requisite notice, commenced an action against the Caradon Company and the receiver to enforce this agreement.

On May 3, 1901, it was ordered that the Looe Company should lodge 6600*l.* Metropolitan Consolidated 3½ per cent. Stock in court to answer the receiver's claim for the value of the rolling stock and other chattels, and that upon that lodgment being made the receiver should deliver to the Looe Company possession of the Looe Company's railway and the said rolling stock and other chattels.

The value of the rolling stock and other chattels was subsequently agreed at 3850*l.*

By an order of October 25, 1901, it was declared that the receiver was entitled to 3850*l.* cash out of the funds in court to the credit of the action, with interest at 4 per cent. from May 8, 1901, when the Looe Company took possession.

By an order of May 24, 1902, it was ordered that the sum of 3636*l.* Metropolitan Consolidated 3½ per cent. Stock, the equivalent of 3850*l.* cash and 150*l.* interest (less tax), should be carried over to the credit of the Caradon Company.

The question arising whether the 3636*l.* Metropolitan Consolidated 3½ per cent. Stock ought after payment of costs and

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expenses to be distributed amongst the debenture-holders, according to their priorities, or amongst all the creditors equally, the receiver presented this petition to determine the point, and asked that the residue of the said stock might be distributed accordingly.

W. E. Vernon, for the receiver.

Hon. E. C. Macnaghten, K.C., and *Maugham*, for the debenture-holders. The debenture-holders had a floating charge on the rolling stock and other chattels as part of the undertaking, and, apart from the statutory agreement, could have restrained any sale outside the ordinary course of business: *Yorkshire Railway Wagon Co.* v. *Maclure*. (1) Even before the Railway Companies Act, 1867, s. 4, which prevents rolling stock or plant being taken in execution, they could have restrained proceedings under an elegit: *Legg* v. *Mathieson* (2), approved in *Wildy* v. *Mid-Hants Ry. Co.* (3)

On a statutory sale of the undertaking they have priority over subsequent judgment creditors against the purchase-money: *Furness* v. *Caterham Ry. Co.* (4); and the same rule must apply to a statutory sale of part of the undertaking. Their charge is given priority by s. 23 of the Railway Companies Act, 1867, and the receiver must distribute the fund accordingly under s. 4.

Eve, K.C., and *Mark Romer*, for the unsecured creditors. The debentures merely charge the undertaking, tolls, and sums of money ejusdem generis. There is no charge on the surplus lands, rolling stock, or other chattels: *Gardner* v. *London, Chatham and Dover Ry. Co.* (5)

[SWINFEN EADY J. There is no specific charge; but is there not a floating charge on the rolling stock and other chattels as part of the undertaking?—*Yorkshire Railway Wagon Co.* v. *Maclure*. (1)]

There is no decision to that effect; the observations of Jessel M.R. were only dicta.

(1) 21 Ch. D. 309, 314.
(2) (1860) 2 Giff. 71.
(3) (1868) 16 W. R. 409.
(4) (1859) 27 Beav. 358.
(5) (1867) L. R. 2 Ch. 201, 215, 217.

Surplus lands are just as much part of the undertaking as rolling stock or other chattels, and yet there is no charge on them even where a receiver has been appointed: *In re Hull, Barnsley and West Riding Junction Ry. Co.* (1) In the absence of a charge s. 23 has no operation: *In re Hull, Barnsley and West Riding Junction Ry. Co.* (1) Sect. 4 only applies to the receipt of tolls or other sums of money ejusdem generis which the receiver is appointed to receive. It has no application to the receipt of a capital sum under a special statutory agreement like the present.

Hon. E. C. Macnaghten, K.C., in reply. Surplus land is in a different position to rolling stock or other chattels. It forms no part of the permanent undertaking, and can only be retained for a limited period. Rolling stock and other chattels, on the other hand, are part of the undertaking, and cannot be sold en masse without statutory authority.

The appointment of a receiver under s. 4 brings s. 23 into operation with reference to anything forming part of the undertaking: *In re Hull, Barnsley and West Riding Junction Ry. Co.* (2)

SWINFEN EADY J. stated the facts, and continued:—The question is how the fund in court ought now to be dealt with. Ought it to be distributed between the debenture-holders according to their priorities so that the first debenture-holders will exhaust it, or ought it to be distributed between the whole of the creditors of the Caradon Company, both secured and unsecured, rateably according to their debts? I am of opinion in the first place that this fund is money received by the receiver within the meaning of s. 4 of the Act of 1867. The agreement of 1895, confirmed by the statute of 1895, recites the appointment of a receiver under the Railway Companies Act, 1867, and then provides for the payment in question being made to that receiver. It seems to me that it is impossible to say that the money which the agreement, confirmed by statute, says is to be paid to the receiver, and which has in effect been received by him, is not money received by the receiver.

(1) 40 Ch. D. 119. (2) 40 Ch. D. 130.

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Then it was urged that s. 4 of the Act of 1867 only applied to moneys received by the receiver in the nature of tolls or other receipts from the undertaking as a going concern. That is not the language of the section. The section does not refer to his being appointed receiver of the rates and tolls. The section sanctions "the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company," and then provides that "all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein." Then s. 23 provides that "all money borrowed or to be borrowed by a company on mortgage or bond or debenture stock under the provisions of any Act authorizing the borrowing thereof shall have priority against the company and the property from time to time of the company over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act."

There is not very much authority upon this question. In *Yorkshire Railway Wagon Co.* v. *Maclure* (1) Jessel M.R. expressed an opinion on the point, but it was not anything more than an opinion, because it was not necessary for the decision of the case. He said: "I am not going to say that debenture holders have not some sort of security over the rolling-stock, though what its precise nature may be is another matter. It may be that they have this kind of security, that is a security on the rolling-stock for the time being—because it is always changing, it is not like a mortgage—subject to the right of the railway company not only to use it in the ordinary course of business, but to replace it in the ordinary course of business; that is to say, they may sell or part with or use those wagons, engines, locomotives, and so on, and replace them by others either of a better description or otherwise, so that they may part with them for any reasonable purpose in the ordinary course of business. If there is a new invention,

(1) 21 Ch. D. 309, 314.

and they find they can buy some better locomotives, they may part with the old stock, or if they become useless and they can hire a better class of locomotives, I should say that they might part with them in the ordinary course of business. But as at present advised, I do not think they could sell the whole of the rolling-stock to pay the debts which were subsequent in priority to the debentures. I think that is the answer to any notion of this contract affecting the rights of the debenture holders. If it were not a contract in the ordinary course of business, if it were a mere mode of raising money for the purpose of paying debts which ranked below the debenture holders, the only result would be that people who bought the rolling-stock would buy subject to the incumbrance of the debenture holders."

I am of opinion that the present transaction, although intra vires because it is expressly authorized by statute, is not a dealing by the railway company with its rolling stock in the ordinary course of business. It is a special bargain sanctioned by the Legislature by reason of the insolvent condition to which the Caradon Company had come. It was no longer able to pay its debts, and was no longer able to carry on its undertaking as previously provided by Parliament, and, therefore, some arrangement had to be made, and Parliament sanctioned the sale of its rolling stock and other chattels to the Looe Company on the terms that the Looe Company should work the line and the undertaking, as it has done.

In *In re Hull, Barnsley and West Riding Junction Ry. Co.* (1) Lindley L.J., in considering the construction of ss. 4 and 23 of the Railway Companies Act, 1867, suggested three occasions on which s. 23 might come into operation, one of which was when a receiver was obtained under s. 4. Then he said: "The concluding words of that section state that the receiver is to apply what he receives in payment of the creditors according to their priorities; and interest payable to the debenture-holders would, I apprehend, come before interest payable to other creditors."

In my opinion s. 4 has come into operation in the present

(1) 40 Ch. D. 119, 130.

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case. The fund is money received by the receiver within the meaning of s. 4, and should be applied in the first instance in payment of those creditors who have a charge on the entire undertaking. They have priority against the company and the property of the company under s. 23; and it is in accordance with the priorities that the receiver ought to distribute the fund. The fund, subject to the payment of costs, is therefore divisible amongst the first debenture-holders.

Solicitors: *Burchells*; *Rowcliffes, Rawle & Co.*; *Cameron, Kemm & Co.*

G. R. A.

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June 20, 30; *Aug.* 6.

In re FLETCHER AND DYSON.

Solicitor—Costs—Taxation—Lessor and Lessee—Costs of Lease—Concurring Parties—Separate Solicitors—Collective Bill—Costs of Taxation.

On taking a lease from a lessor and concurring parties represented by separate solicitors, the lessee, in the absence of agreement express or implied, is only liable for one set of costs.

If the lessor's solicitor includes the costs of the concurring parties' solicitors in his own bill, and more than one-sixth is taxed off the total amount, he must pay the costs of taxation, although less than one-sixth is taxed off his own costs.

In re Remnant, (1849) 11 Beav. 603, distinguished.

SUMMONS to review taxation.

This was a summons by a lessee to review the taxation of the bill of costs of his lessor's solicitors.

In December, 1902, the vicar of Kirkburton, with the concurrence of the patron of the benefice and the Ecclesiastical Commissioners, granted a lease of stone quarries on part of the glebe to the lessee under the provisions of the Ecclesiastical Leasing Acts, 1842 and 1858 (5 & 6 Vict. c. 108; 21 & 22 Vict. c. 57), a previous lease being surrendered as part of the transaction.

The lessor, the patron, and the Commissioners were represented by separate solicitors.

The lessor's solicitors delivered their bill with detailed items to the lessee, and included the costs of the patron's solicitors,

the Commissioners' solicitors, and the lessor's surveyors as out-payments, making the total bill 66*l.* 14*s.* 1*d.*

The lessee obtained an order to tax under the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38.

The result of the taxation was as follows :—

	Charge.	Disallowed.	Allowed.
	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*
Lessor's solicitors' charges . .	17 17 8	1 15 8	16 2 0
Out-payments—			
Printers' charges . . .	3 10 7	..	3 10 7
Stamp and stamping and telegram	0 13 10	..	0 13 10
Patron's solicitors' charges . .	7 7 0	..	7 7 0
Commissioners' solicitors' charges.	23 1 6	11 0 10	12 0 8
Lessor's surveyors' charges . .	14 3 6	10 10 0	3 13 6
	66 14 1	23 6 6	43 7 7

The taxing master treated the last three items as if included in a cash account and not part of the bill, the result being that only 1*l.* 15*s.* 8*d.* was disallowed out of 22*l.* 2*s.* 1*d.*, the amount of the first three items. He therefore gave the lessor's solicitors the costs of the taxation.

The lessee carried in objections, and submitted that he was not bound to pay the costs of concurring parties acting by separate solicitors, or the costs of the lessor's surveyors. The latter had charged 12*l.* 12*s.* for negotiating new lease, instructing solicitors, and being generally engaged on the matter, and 1*l.* 11*s.* 6*d.* for clerk's time for preparing tracing plans, but it did not appear that they had done any work after the agreement was arrived at for which the lessee was liable. The plan on the lease was put on by the printers.

The taxing master disallowed the objections, and stated that he had disallowed all charges whether of surveyors or solicitors leading up to the agreement to take the lease. The objections did not raise any question as to the costs of the taxation.

The lessee took out this summons to review.

The lessor's solicitors stated that they were prepared if necessary to prove a special contract by the lessee to pay all the costs, and tendered a letter of July 11, 1902, from the Commissioners to the lessor's surveyors, to the terms of which

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they said the lessee had assented. This letter inclosed a tracing in green of the land to be let, and stated that the subsisting lease must be surrendered and that all costs must be borne by the lessee. The question of special contract was not, however, before the taxing master, and the case was argued on the general principle.

R. Rowlands, for the lessee. The lessee is liable by established custom to pay the costs of the lessor's solicitors for drawing the lease: *Grissell* v. *Robinson* (1); and to pay counsel's fees for settling it, if counsel's assistance is necessary: *In re Gray*. (2) But he is only liable for one set of costs, and is not bound to pay the costs of concurring parties acting by separate solicitors: Cordery on Solicitors, 3rd ed. p. 70.

Secondly. The costs of the patron's and Commissioners' solicitors and the lessor's surveyors were really charged as disbursements, and the taxing master has treated them as such by taxing them, though for the purpose of the one-sixth rule he treats them as items of a cash account. But the bill must be taxed as delivered: *In re Heather* (3); and, as more than one-sixth has been taxed off, the lessee is entitled to the costs of the taxation.

Thirdly. The charges of the lessor's surveyors were for work anterior to the agreement, and should be entirely disallowed against the lessee: *In re Gray*. (2)

Hewitt, for the lessor's solicitors. The consent of the patron and the Commissioners is required to ensure proper compliance with the Acts: *Ecclesiastical Commissioners* v. *Pinney* (4); and they were necessary parties to the lease: Ecclesiastical Leasing Act, 1842, ss. 6, 7, 21. The lessee who held a previous lease must have known that their concurrence was necessary, and as "the lessee must be held to have impliedly contracted to indemnify the lessor against expenses properly incurred in preparing the lease"—*In re Gray* (2)—there was an implied contract to pay the costs of the concurring parties.

(1) (1836) 3 Bing. N. C. 10, 15; 43 R. R. 574.
(2) [1901] 1 Ch. 239, 244.
(3) (1870) L. R. 5 Ch. 694.
(4) [1899] 1 Ch. 99, 106.

Secondly. The point as to the costs of taxation cannot now be raised, as it was not raised by the objections: Order LXV., r. 27, sub-rr. 39, 41. In any case the payments to the patron's and Commissioners' solicitors and the lessor's surveyors were not disbursements, but cash account charges which must be disregarded in applying the one-sixth rule: *In re Remnant.* (1)

Thirdly. The taxing master states that he has disallowed the surveyors' costs incurred previous to the agreement, so that he must have considered that the 3*l.* 13*s.* 6*d.* was incurred after the agreement.

Rowlands, in reply. The observation of Cozens-Hardy J. in *In re Gray* (2) had reference to the payment of counsel's fees, and was not intended to lay down a general rule.

Order LXV., r. 27, sub-rr. 39, 41, refer to objections to items, and have nothing to do with the costs of taxation which are provided for by the order to tax: *In re Castle.* (3)

Cur. adv. vult.

Aug. 6. SWINFEN EADY J., after stating the facts and pointing out that the two sums of 1*l.* 15*s.* 8*d.* and 11*l.* 0*s.* 10*d.* disallowed off the costs of the lessor's and Commissioners' solicitors exceeded one-sixth of the bill, continued:—The lessee seeks to review the taxation on several grounds. The first ground is that, as lessee, he is only liable to pay the costs of the lessor acting by one solicitor, and that if the concurrence of two other parties, acting by separate solicitors, is necessary, there is not any custom which compels him as lessee to pay these additional costs. In the leading case of *Grissell* v. *Robinson* (4) Tindal C.J. said: "The evidence shews that it is the custom for the landlord's attorney to draw the lease, and that it is paid for by the lessee"; but in that case there was only one bill of costs in question, the lease being drawn by Mr. Taylor, the attorney for the executors of Mr. Peto. In

(1) 11 Beav. 603.
(2) [1901] 1 Ch. 239, 244.
(3) (1887) 36 Ch. D. 194.
(4) 3 Bing. N. C. 10, 15; 43 R. R. 574.

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the recent case of *In re Gray* (1), in which Cozens-Hardy J. had to consider the question of the lessee's liability under a third-party order to tax the lessor's solicitors' costs, he said: "On principle the lessee must be held to have impliedly contracted to indemnify the lessor against expenses properly incurred in preparing the lease." But the judge was there considering whether the fees of counsel for settling a draft lease might be properly allowed as part of the costs, and not whether, if there were several lessors, acting by different solicitors, the lessee was to pay several sets of costs. I have communicated with the taxing master as to whether there is any settled practice in the taxing office on the subject, and he reports to me as follows: "None of my colleagues have ever had to consider the question, and consequently it cannot be said that there is any settled practice." In Cordery on Solicitors, 3rd ed. p. 70, the practice where there are several lessors is stated as follows: "In taking a lease from two or more persons who employ different solicitors, as e.g., mortgagor and mortgagee, tenant for life and remainderman, or tenants in common, in the absence of agreement the lessee pays one set of costs only," and this statement appears to be based upon an opinion of the council of the Law Society expressing their opinion as to the practice of solicitors and the understanding of the profession. Under these circumstances, I am unable to assume, in the absence of any evidence on the subject, that there is any general custom binding a lessee to pay several sets of costs where there are several lessors represented by different solicitors. In all such cases the question must be considered whether there is any contract by the lessee to pay, either express or to be implied from the nature of the case and the circumstances under which the arrangement for the new lease was arrived at. In the present case, having regard to the fact that it was part of the arrangement for the new lease that a subsisting lease between the same parties should be surrendered and to the course of the negotiations and to the letter of the Ecclesiastical Commissioners of July 11, 1902, which (if neces-

(1) [1901] 1 Ch. 239, 244.

sary) can be strictly proved, there would probably be little difficulty in establishing such an agreement by the lessee; the question has not yet been raised in this form before the master, as the lessee applied to tax the whole bill delivered on or about December 11, 1902, on the footing that he was liable to pay the same, subject to taxation; but, if the lessee desires it, the matter must be referred back to the master to inquire whether there was any contract by the lessee, express or implied, to pay the three sets of lessors' costs.

The next ground for reviewing the taxation put forward by the lessee is that more than one-sixth has been taxed off, and so the costs of taxation should be borne by the lessor's solicitors, and not by the lessee. It was not disputed that the costs of the Commissioners' solicitors were properly subject to taxation, and were duly and regularly taxed by the master, and that more than one-sixth of the whole bill as delivered has been taxed off; but reliance was placed upon *In re Remnant* (1) as deciding that a professional payment by one solicitor to another was properly included in a cash account, and ought not to be taken into account for the purpose of calculating the one-sixth. I am of opinion that the costs of the patron's and Commissioners' solicitors do not come within this rule. In the first place, these costs are taxable items. In the next place, they are not disbursements made by the lessor's solicitors as agents on the order of the lessee; the payments were not made by them at the request of the lessee. Strictly speaking, the lessor's solicitors were under no liability to make the payments, and had no right to make them, so as to charge the lessee with the amount. If the patron's and Commissioners' solicitors had delivered their costs directly to the lessee, then, assuming that he was liable to pay them, he would have had the same right to tax them, and upon the same terms, as in the case of the lessor's solicitors' costs, and with the same consequences in the event of a sixth being taxed off; and his right cannot be prejudicially affected by the lessor's solicitors including the costs of the other solicitors in their bill. For these reasons I am of opinion that the costs of taxation must be borne by the

(1) 11 Beav. 603.

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lessor's solicitors, who have chosen to include other costs in their costs, and more than a sixth of the whole costs having been taxed off. It was urged by their counsel that the question of the costs of the taxation was not open to the lessee, as it was not the subject of any objection; but Order LXV., r. 27, sub-rr. 39, 41, only apply where particular items are objected to: *In re Castle* (1); there is no rule which necessitates an objection being carried in, in such a case as the present, where more than a sixth of the bill of costs has been disallowed, but where, nevertheless, the master proceeds to tax and allow the costs of the solicitors. In so doing he has acted on a wrong principle and not in obedience to the order, which in the event which has happened directed him to tax the costs of the lessee, and not the costs of the solicitors.

The remaining objection is to the allowance of 3*l.* 13*s.* 6*d.* for the charges of the lessor's surveyors. It was decided in *In re Gray* (2) by Cozens-Hardy J. that the lessee is not liable to pay the fees of a mining expert employed by the lessor, and I cannot gather from the materials before me that the surveyors did any work after the agreement for a lease had been arrived at which the lessor is entitled to charge against the lessee. The taxing master states in his answers to objections that he has disallowed all charges, whether of surveyors or solicitors, leading up to the agreement to take the lease; but I cannot find from the particulars of the surveyors' charges that they did any work after the agreement was arrived at for which the lessee is liable. The surveyors charged for negotiating new lease, instructing solicitors, and being generally engaged on the matter. The master has allowed an apportioned part of the amount charged. I have no particulars whatever of any work done by the surveyors for which the lessee ought to pay; the surveyors did not even put the plan on the lease; a tracing, coloured green, of the land to be let is referred to in the letter of the Ecclesiastical Commissioners of July 11, 1902, before the agreement was come to, and the bill of costs of the solicitors contains in the item "Printers' charges" the amount charged for placing the plan on the lease. Under these circum-

(1) 36 Ch. D. 194. (2) [1901] 1 Ch. 239, 244.

stances, the 3*l.* 13*s.* 6*d.* surveyors' charges must be disallowed. The matter must go back to the taxing master to review his taxation accordingly. The costs of this application will be costs in the taxation.

Solicitors: *J. Woodhouse, for C. H. Marshall, Huddersfield; Iliffe, Henley & Sweet, for Laycock, Dyson & Laycock, Huddersfield.*

G. R. A.

WILKINSON *v.* LLANDAFF AND DINAS POWIS RURAL DISTRICT COUNCIL.

[1902 W. 2181.]

Local Government—Duty of Local Authority—Cleansing Sewers—Meaning of "Sewer"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 19, 21.

At the side of a road, which was vested in a local authority, was an open channel (not paved with stone and not very clearly defined on the side toward the centre of the road) made for the purpose of carrying off the surface water from the road. In the channel were gullies by which the water passed through pipes into an underground drain. Rain water from the roofs and the curtilages of many of the houses in the road (including the plaintiff's) also passed through pipes into the channel. Sewage from one of the houses (not the plaintiff's) had escaped into the channel, and had caused an illness of the plaintiff's child, and the plaintiff had thereby incurred expense.

In an action by the plaintiff against the local authority claiming an injunction and damages:

Held, that the channel was a "sewer" within the definition contained in s. 4 of the Public Health Act, 1875, and that under s. 19 it was the duty of the defendants to cleanse the channel so that it should not be a nuisance or injurious to health.

An injunction was accordingly granted to restrain the defendants from permitting any foul or noxious matter to remain in the channel so as to cause a nuisance to the plaintiff, and 30*l.* damages was awarded to him.

Decision of Phillimore J. affirmed.

Per Vaughan Williams L.J.: *Kinson Pottery Co.* v. *Poole Corporation*, [1899] 2 Q. B. 41, is not a decision that a drain may be a sewer for some of the purposes of the Public Health Act and not for others.

APPEAL from a decision of Phillimore J.

The action was brought in the Chancery Division, and was tried at Cardiff, at the spring assizes, 1903.

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The plaintiff was the occupier of a house, called Thornleigh, situate in a road called Millbrook Road, in Dinas Powis, within the district of the defendants. This road was vested in the defendants. At the side of the road was a channel or gutter for the purpose of carrying off water from the surface of the road. The water when in the channel ran down gratings or gullies fixed in it, and thence through pipes into an underground drain. Into this channel there also ran rain water from the roofs of many of the houses in the road, and surface water from the curtilages of those houses, through pipes which opened into the channel. The nature of the road and the channel was thus described by one of the witnesses, who was an architect and surveyor. The road had a properly formed carriage way, and there was a footpath at the side, formed of stone and gravel and ashes in places. There was no properly formed gutter or curbing or channelling. The footpath was slightly raised above the road. The gutter was not paved with stone, but was simply like the surface of the road. It was in fact made where the curving or sloping of the road met the raised footpath.

Under the gardens of two of the houses in the road, called Rosedene and Thistledene, that is, partly under one garden and partly under the other, was a cesspool for the reception of sewage from those houses. From this cesspool some liquid sewage overflowed and found its way through the soil of the gardens, which were at a higher level than the road, into the channel at the side of the road. When this sewage was in the channel it did not rapidly run off, but, owing to depressions in the soil of the channel, some of the sewage matter remained in stagnant pools, and thus noxious gas was produced. In consequence of this the plaintiff's child became unwell, and the plaintiff incurred expense for medical attendance and otherwise for the child.

By this action the plaintiff claimed an injunction to restrain the defendants from permitting any foul or noxious matter to remain in the channel so as to cause a nuisance to the plaintiff. The plaintiff also claimed damages by reason of the expense which he had incurred in consequence of the illness of his child.

The liability of the defendants depended upon the question whether the channel at the side of the road was a "sewer" within the definition contained in s. 4 of the Public Health Act, 1875.

Phillimore J. held that the channel was a "sewer," and that consequently, under s. 19 of the Act, it was the duty of the defendants to cleanse it. And the learned judge granted the injunction claimed and awarded the plaintiff 30*l.* damages.

The defendants appealed.

S. T. Evans, K.C., and *J. Sankey*, for the defendants. The dispute is as to whether the defendants are liable under ss. 42 and 43 of the Public Health Act, 1875, to cleanse the channel in question, s. 42 providing that "Every local authority may, and when required by order of the Local Government Board shall, themselves undertake or contract for . . . . the cleansing of earth-closets privies ashpits and cesspools; either for the whole or any part of their district"; and s. 43 rendering the local authority liable to a penalty for neglect to do so. The authorities shew that where the local authority has, as in the present case, entered into a bonâ fide contract to have the work done, it is not liable if the work is not done: *Ellis* v. *Strand District Board of Works.* (1)

But the real question is whether the channel is a "sewer" or a "drain" within the definition clause, s. 4 (2) of the Public Health Act.

(1) (1892) 67 L. T. 307.

(2) Sect. 4 provides that "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them, that is to say" (inter alia): "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. 'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act."

By s. 19, "Every local authority shall cause the sewers belonging to them to be constructed covered ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied."

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It is clear, it is submitted, that this channel is not a "sewer": it is not a sewer requiring to be covered and ventilated under s. 19. The result of the authorities is that a channel of this kind cannot be used at all as a sewer for fæcal matter, but only for surface water. The mere fact that sewage may have been discharged into it is not of itself sufficient to make it a "sewer."

[VAUGHAN WILLIAMS L.J. referred to *Rathmines Improvement Commissioners and Drainage Board* v. *South Dublin Union*. (1)]

That case has very little application, for it was not under the Act of 1875.

[VAUGHAN WILLIAMS L.J. That does not matter. The definition of a "sewer" is very wide.]

A "sewer" may be a sewer for certain purposes, but not for all: *Graham* v. *Wroughton* (2); *Kinson Pottery Co.* v. *Poole Corporation*. (3)

[VAUGHAN WILLIAMS L.J. referred to *Holland* v. *Lazarus*. (4)]

In s. 67 of the old Highway Act, 1835 (5 & 6 Will. 4, c. 50), a distinction is made between "gutters" and "drains."

[STIRLING L.J. Is not a gutter a description of drain?]

It is submitted that it is not. This channel is neither a "sewer" nor a "drain"; if it is not a "drain" it cannot be a "sewer."

Sect. 21 of the Act, though it entitles an owner to cause his drains to empty into the sewers of a local authority, on giving notice, and complying with the local authority's regulations, does not entitle him to empty all kinds of filth into a small roadside drain, and leave the local authority to deal with it as best they can: *Kinson Pottery Co.* v. *Poole Corporation*. (5) Phillimore J. was of opinion, upon the authority of that case, that this was a "sewer" within the definition in s. 4 of the Act. If the learned judge is right, and this is in fact a "sewer," then the defendants are not liable to cleanse it, they having entered into a bonâ fide contract with a contractor, in the usual way, to do the work.

(1) [1899] 1 I. R. 157.
(2) [1901] 2 Ch. 451.
(3) [1899] 2 Q. B. 41.
(4) (1897) 66 L. J. (Q.B.) 285.
(5) [1899] 2 Q. B. 47.

As to the other cases cited by the learned judge, *Newcastle-upon-Tyne Corporation* v. *Houseman* (1) and *Sykes* v. *Sowerby Urban Council* (2), neither of them is an authority to the effect that such a channel or gutter is a "sewer": they both have reference to a constructed drain or to a drain which has been used as a sewer. If this channel is a "sewer," it follows that every garden pipe between two houses must be a "sewer."

[STIRLING L.J. Was not that so decided by the Court of Appeal in *Silles* v. *Fulham Borough Council*? (3)]

There the drain was a deep underground pipe, and it was obviously a sewer as regarded one house; it could make no difference that it carried only rain water from the other house. It could not have been intended that the definition of "sewer" in s. 4 should apply to such a channel as this. If it is a "sewer," then under s. 21 any owner or occupier within the district will be entitled, on giving proper notice to the defendants, to drain into it; and under s. 22 even persons outside the district may do so. And an agricultural drain, made for the purpose of carrying off water from several fields in different occupations, would be a "sewer," which the local authority would be bound to keep in order.

[VAUGHAN WILLIAMS L.J. referred to *Ferrand* v. *Hallas Land and Building Co.* (4)]

B. Francis-Williams, K.C., and *J. Davies Williams*, for the plaintiff, were not called upon.

VAUGHAN WILLIAMS L.J. In my judgment we ought to affirm the decision of Phillimore J. I do not see my way to differ from him either as to his finding of the facts or as to the law which he has applied to those facts.

The facts are these. There are several houses in this road —I believe there are some twenty, but it does not matter what the exact number is—and the rain water from the roofs, and also, as I understand, the surface water from the ground within the curtilages of these houses respectively, does all in fact drain into this channel or space at the side of the road,

(1) (1898) 63 J. P. 85.
(2) [1900] 1 Q. B. 584.
(3) [1903] 1 K. B. 829.
(4) [1893] 2 Q. B. 135.

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and it follows that this channel or space, if it does in fact constitute a "drain," is not within the definition of "drain" in s. 4, which is excepted from the definition of "sewer." [His Lordship read the definitions of "drain" and "sewer" in s. 4, and continued:—]

It is quite plain that, if this channel or space, over which water flows at the side of this highway, is a "drain" of some sort, it is not a "drain" which falls within the exception in the definition of "sewer"—that is, it is not a "drain" as interpreted in the definition of the word "drain."

That being so, the only remaining question for decision is whether that portion of the highway over or along which the surface-water runs is a "drain" within the definition of "sewer." Phillimore J. has come to the conclusion that it falls within the words "drains of every description except drains to which the word 'drain' interpreted as aforesaid applies." Mr. Evans has suggested that this channel does not come within those words, because it is difficult to define its lateral extension. There is no edge to it separating it from the highway. I do not think that makes any difference. We must look at the purpose for which this graduated hollow was made at the side of the road. I cannot doubt that it was made for the purpose of drainage. It certainly was made for the purpose of draining the water from the surface of the road. The object of making it was not only that the surface water of the road might run down from the crown to the edge, but also that, having got the water to the edge of the road, it should then be held in a confined space until it reached the gratings which were to convey it into a sewer beneath the road. Under these circumstances it seems to me quite plain that this channel does, as Phillimore J. held, fall within the words "drains of every description" in s. 4. As a matter of fact, the channel carries off not only the water from the surface of the road, but also the water from the adjacent houses. Under these circumstances it not only comes within the words "drains of every description," but it is also clearly outside the definition of "drain."

I do not intend to decide more than this. I am only

deciding that in this case Phillimore J. was right in finding as a fact that this hollow at the edge of the road was used for, and intended to be used for, the purpose of drainage, and that, being used amongst other purposes for the purpose of carrying off the water from houses occupied by different owners, it is a "sewer," and that the local authority are, under s. 19 of the Act, liable to keep it free from pollution. I do not decide that every agricultural drain into which the surface water of two or three fields, or the underground water of two or three fields, runs is necessarily within the words "drains of every description." It is not necessary to decide that to-day. I only decide that this channel, carrying the rain water from these various houses, is a "sewer," and that the local authority are bound to keep it free from pollution.

It was contended that, although the channel might be a "sewer" within the meaning of the Act, yet it was decided by the Queen's Bench Division in *Kinson Pottery Co.* v. *Poole Corporation* (1) that a drain may be a "sewer" for some of the purposes of the Act, and not a "sewer" for other purposes. If that case did so decide, I cannot agree with it. And, moreover, when the judgments of the learned judges, and in particular that of Channell J., are carefully read, it does not seem to me that they did decide anything of the sort. Nor do I think that it was necessary for the purposes of that case that such a decision should be given.

In my opinion, under all the circumstances, this present appeal should be dismissed.

ROMER L.J. I also am of opinion that the finding of fact by Phillimore J., that the channel in question in this case is a "sewer" within the definition in s. 4 of the Public Health Act, was correct. It is a well-defined channel to carry and take away the surface water, not only from the road, but also from the roofs and curtilages of the adjacent houses. It is a channel artificially made for this purpose, and, as I gather from the evidence, there are gullies at regular intervals in the channel to allow the water passing along it to descend to a

(1) [1899] 2 Q. B. 41.

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covered sewer below the surface of the road. And, as I understand, there are already about twenty houses draining the surface water from their roofs and curtilages by pipes into the channel. These circumstances, to my mind, shew that this is undoubtedly a "sewer" within the definition in s. 4.

With regard to the evil consequences which it is suggested will result from this decision—an argument always used in cases of this kind—I may observe that it does not follow that, because this channel is a "sewer" within the definition of the Act, it can be used by any inhabitants of the district for sewage or fæcal matter. From the finding that this channel is a "sewer," it results that the appeal must fail; for clearly, the channel being a "sewer," the duty to cleanse it was cast upon the defendants. That duty they have failed to perform, and this breach of their duty has resulted in damage to the plaintiff as found by the learned judge; and as to that part of the case there is in substance no appeal. It follows that the judgment was right, and the appeal must be dismissed.

STIRLING L.J. I am of the same opinion. We have to consider two questions: first, whether this channel is a "sewer" within the meaning of s. 4 of the Act; and, secondly, whether the defendants have failed to discharge the duties which are imposed upon them by the Act with reference to "sewers" within the meaning of s. 4.

Now, in order to decide the first question, we have to find what is the meaning of a "sewer" as that word is used in the Act. By s. 4, "'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." It has not been contended that the channel in question is a "drain" within the first exception; and it is plain that it does not fall within the second exception, because here the authority having the management of the roads is a local authority under the Act. The question therefore arises with regard to that portion of the definition which makes the word "sewer" include

"sewers and drains of every description," and it really comes to this question of fact: Is this channel a "drain of any description" within the meaning of s. 4? Phillimore J. came upon the facts to the conclusion that it is a "drain," and therefore a "sewer," within the meaning of the Act; and I cannot differ from that finding of fact.

But it has been argued that that cannot be, because, if so, then every owner and occupier has, under s. 21 of the Act, a right to drain into the channel. With all respect to those who use that argument, I think that is an exaggeration of the effect of s. 21. Sect. 21 does not provide that every owner or occupier of premises within the district of a local authority shall be entitled as of right to connect every drain which he has with every sewer belonging to the local authority. That is not the meaning of the section. All that is given by that section to the owner and occupier is a right to have the drain connected or made to communicate with the sewers of the local authority, subject to compliance with certain conditions—amongst others, that he is to comply "with the regulations of the local authority in respect of the mode in which the communication" with the sewers is to be made. So that, in my opinion, the local authority may define by regulation the particular sewer with which the communication is to be made. I do not think, therefore, that anything based upon that section can prevent the Court from coming to the conclusion that this channel is a "sewer" within the meaning of the Act.

Then, that being so, have the defendants failed to fulfil the duty imposed on them by the Act with reference to "sewers" within its meaning? That turns on the construction of s. 19. [His Lordship read the section.]

It is alleged that the defendants failed to keep this channel, which we hold to be a "sewer," so as "not to be a nuisance or injurious to health, and to be properly cleansed." What happened was that sewage—fæcal matter—escaped into the channel—escaped, I assume, improperly and contrary to law, and, having thus escaped, was permitted by the defendants to remain, and was not removed by them. It seems to me that inasmuch as the plaintiff did not cause, and was not in any way

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answerable for the escape of the fæcal matter, the defendants failed in their duty; and it is no answer to the plaintiff to say that some one else was guilty of a wrongful act in permitting the escape of the fæcal matter. In that respect the present case entirely differs from *Kinson Pottery Co.* v. *Poole Corporation* (1), because there the parties complaining were the very persons who were answerable for the improper escape of the fæcal matter into the sewer. And the Court held—and, if I may say so, rightly—that the appellants could not take advantage of their own wrong. Here no such question arises, and it seems to me that in this respect also the finding of the learned judge is in accordance with law.

I agree with my brethren that the appeal fails.

Solicitors: *Cunliffes & Davenport, for L. G. Williams & Prichard, Cardiff; Riddell & Co., for E. W. Pocock, Cardiff.*

(1) [1899] 2 Q. B. 41.

W. L. C.

KEKEWICH J.

1903

Aug. 5.

In re COTGRAVE. MYNORS *v.* COTGRAVE.

[1903 C. 1140.]

Will—Construction—Forfeiture of Life Interest—"Alienate or incumber"—Petition in Bankruptcy by Tenant for Life—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52).

Under a will property was given to one for life with a gift over in the event of his "alienating or incumbering, or agreeing to alienate or incumber," his interest. He presented a petition in bankruptcy, and on the same day was adjudicated a bankrupt on his own application:—

Held, that the petition in bankruptcy and adjudication consequent thereon constituted an alienation within the meaning of the gift over.

In re Amherst's Trusts, (1872) L. R. 13 Eq. 464, followed.

Ex parte Lovell, [1901] 2 K. B. 16, distinguished.

ADJOURNED SUMMONS.

EDWARD STONE COTGRAVE by his will, dated July 17, 1866, directed that a sum of 15,000*l.* should be set apart by his trustees and held upon trust for his grandson, Richard de Malpas Cotgrave Farmar, for his life, and after his decease for his children; and, after bequests in favour of other grandchildren of his, the testator declared that in the event of either of his grandchildren, on their coming of age, or at any subsequent time, "alienating or incumbering, or agreeing to alienate or incumber," their shares or interests in either capital or income of the trust funds to which they became entitled, such one or more of his grandchildren so alienating or incumbering, or agreeing to alienate or incumber, his or their share or interest or any part thereof should from thenceforth, for themselves and their issue, absolutely forfeit all benefit to which he or they would otherwise be entitled, and in such case the share or shares in money so forfeited should go to and vest in the eldest son who should attain twenty-one of the testator's brother, Colonel Thomas Eaton Cotgrave.

The testator died on October 31, 1868, and on November 24, 1868, his will was duly proved by the executors therein named.

Richard de Malpas Cotgrave Farmar, pursuant to a direction

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contained in the will, assumed and used the name of Richard de Malpas Cotgrave only.

On December 6, 1877, Richard de M. Cotgrave was married to his present wife, Amelia Farmar Cotgrave. By her he had eight children, seven of whom were living, and were infants.

By an order of the Court made in an action of *In re Cotgrave, Cotgrave* v. *Whitehead* [1901 C. 1871], and dated April 8, 1902, it was declared that the forfeiture clause relating to alienation above stated included the interest in remainder of the child, children, or other issue of the testator's grandchild as well as the life interest of the grandchild disregarding and transgressing the prohibition.

By an indenture dated March 16, 1903, and made between Thomas Manson Cotgrave, the eldest son of the testator's brother, Colonel Thomas Eaton Cotgrave, in the will named, of the one part, and Amelia Farmar Cotgrave of the other part, Thomas M. Cotgrave, in consideration of the sum of 500*l.*, to be paid within six months from the date of the execution of the said indenture, absolutely conveyed and assigned as beneficial owner unto Amelia F. Cotgrave the contingent reversionary interest in the said settled sum of 15,000*l.* to which Thomas Manson Cotgrave was entitled in reversion under or by virtue of the will, or to which he might thereafter become entitled under or by virtue thereof, and the stocks, funds, securities, moneys, and property which might from time to time represent the same or any part thereof: provided always, that if within three months from the date thereof it should transpire that at the date thereof, by reason of any act, deed, or thing done or omitted by Richard de M. Cotgrave, Thomas Manson Cotgrave was entitled to the investments representing the said settled sum of 15,000*l.* in possession and not contingently, then those presents should be absolutely void, and any moneys paid thereunder by the said Amelia F. Cotgrave should be forthwith repaid.

On March 19, 1903, Richard de M. Cotgrave filed in the county court of Devonshire holden at Exeter a petition in bankruptcy, upon which the said Court on the same day made a receiving order, and on his application adjudged the

said Richard de M. Cotgrave bankrupt; and subsequently, upon the application of the official receiver, the Court ordered the estate of the said Richard de M. Cotgrave to be administered in a summary manner.

The question thereupon arose whether the bankruptcy of Richard de M. Cotgrave constituted an alienation by him within the meaning of the will so as to give rise to a forfeiture; and the present summons was taken out by Thomas Baskerville Mynors and Edward Hugh Whitehead, the trustees and executors of the will, as plaintiffs, against Richard de Malpas Cotgrave, Amelia Farmar his wife, Thomas Manson Cotgrave, and Arthur Edward Ward (official receiver and trustee in bankruptcy of Richard de M. Cotgrave) as defendants, for the determination of the question whether Richard de M. Cotgrave had forfeited his interest in the said sum of 15,000*l.* or the securities representing the same.

The summons was adjourned into Court, and now came on for hearing.

Adams, for the plaintiffs, in support of the summons, submitted the question to the Court.

Stewart-Smith, K.C., and *Rooth*, for parties claiming under the gift over. It is submitted that there has been an "alienation" within the meaning of the forfeiture clause, and that the gift over of the income has taken effect. In Theobald on Wills, 5th ed. p. 552, after a statement that where property is given over upon alienation, that term includes only voluntary alienation and not a hostile bankruptcy, it is added, "but the presentation of a petition by the legatee under the Insolvent Debtors Act, or under the arrangement clauses of the Bankruptcy Act, 1869, is a voluntary alienation," and a number of authorities are cited of which the most recent is *In re Amherst's Trusts*. (1) Reference is also made to *Ex parte Dawes* (2), where Cave J. distinguished *In re Amherst's Trusts* (1); but the proviso for cesser in the case before him was if the debtor should "do or suffer anything whereby the income, if payable to him absolutely, would become vested

(1) L. R. 13 Eq. 464. (2) (1886) 17 Q. B. D. 275.

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in any other person," and the property did not become vested, because no adjudication was ever made, but a composition was entered into.

[KEKEWICH J. referred to the observations of Wright J. on *In re Amherst's Trusts* (1) in *Ex parte Lovell.* (2)]

Those observations do not apply to the present case, because here the adjudication was made on the same day on which the petition of bankruptcy was presented.

Tyrrell and *Roscoe*, for other parties in the same interest.

J. G. Wood, for the official receiver. It is submitted that there has been no forfeiture. Immediately before the bankruptcy there was an assignment of the property to the debtor's wife for a nominal sum of money. The bankruptcy was brought about in order to bring about the forfeiture, so as to give effect to the colourable purchase by the wife. Forfeiture clauses are to be strictly construed. Here the only words are "alienate" or "incumber"; there are no words such as "part with" as in *In re Amherst's Trusts* (1); the only other word is "agree." In the cases referred to in Theobald the applications were under the Insolvent Debtors Acts, and the reason why they were held to be alienations bringing about forfeiture was because, under those Acts, the debtor had to make a kind of bargain with his creditors, and to represent to the Court that if he were discharged he was willing to assign over for the benefit of his creditors. The Court had no power unless the debtor put the machinery in action. The cases under the Insolvent Debtors Acts all proceed on the footing that there was a deliberate act of the debtor. The procedure under the Bankruptcy Act, 1883, is entirely different. In *Graham* v. *Lee* (3) there was a clause of forfeiture in case of a party attempting or agreeing to assign or anticipate a fund, and it was held that a voluntary declaration of insolvency under which a fiat immediately issued did not create a forfeiture. That case is very close to the present one. Here, as there, the alienation is by operation of law. It is not an alienation by the petitioner followed by the operation of law. In *Croft* v.

(1) L. R. 13 Eq. 464. (2) [1901] 2 K. B. 16.
(3) (1857) 23 Beav. 388.

Lumley (1) the law is laid down to the same effect by Lord Wensleydale in respect of a warrant of attorney which, by the operation of 1 & 2 Vict. c. 110, might cause an incumbrance, though it was not in itself an alienation. That is, therefore, analogous to the presentation of a bankruptcy petition. Where there is a clause of forfeiture which depends on alienation, it is necessary to find that there has been a direct alienation; it is not sufficient that some act has been done which may lead to an alienation. The petition in bankruptcy is not an alienation; if the debtor's property vests in the official receiver, it is an alienation by operation of law, and not by the act of the debtor himself.

KEKEWICH J. There is no occasion to go back to the Insolvent Debtors Act or to the case of *Croft* v. *Lumley* (1), because I have a direct authority and decision of Bacon V.-C. in the case of *In re Amherst's Trusts* (2) that under the Bankruptcy Act of 1869 the presentation of a petition in bankruptcy by the tenant for life, the owner of the property, is sufficient to cause a forfeiture under a clause of this kind. The words in that case were not precisely the same as the words in the present case, but in point of substance they are not distinguishable. There the words were, "assign over, assure, mortgage, or in any manner incumber, or by any instrument in writing, parol agreement, or otherwise howsoever, part from" the income. Here what is contemplated is "alienation"—a more general term—with the addition of incumbrance. The words are, "alienating or incumbering, or agreeing to alienate or incumber." Here it is alienation; there it was assignment over; and Bacon V.-C., who besides being Vice-Chancellor had experience as Chief Judge in Bankruptcy, says (3): "The presentation of the petition is undoubtedly an act of bankruptcy; although it is uncertain, when the petition is presented, whether bankruptcy will ensue or not." Then he goes on to point out that one of two consequences must follow, adjudication or liquidation by arrangement, in either case vesting the

(1) (1857) 6 H. L. C. 672, 743. (2) L. R. 13 Eq. 464.
(3) L. R. 13 Eq. 469.

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property in some person other than the bankrupt, and thus causing an alienation of it from him. If I had a case of that kind here it would not be necessary for me to go further. But I have not quite the same case here, because I am dealing with the Act of 1883, and the difference between the Act of 1883 and earlier statutes is pointed out by Wright J. in *Ex parte Lovell* (1), and by Cave J. in *Ex parte Dawes.* (2) I will take what Wright J. says. After referring to cases under the Insolvents Relief Acts and to *In re Amherst's Trusts* (3), and pointing out that the words in that case were more comprehensive than those in the case before him, he says this: "All those cases, except *In re Amherst's Trusts* (3), were determined upon statutes under which the debtor's petition ipso facto effected an assignment of the debtor's property for the benefit of creditors; but under the Act of 1883, even upon a debtor's petition asking for adjudication, the adjudication does not follow automatically. The Court has a discretion in the matter, and, unless the Court in its discretion adjudicates, the creditors may prefer to accept a composition." Therefore he distinguished *In re Amherst's Trusts* (3), and thought that it was inapplicable to a case under the Act of 1883—that is to say, he thought the presentation of a petition was not in itself equivalent to an assignment. The learned judge's distinction does not apply to this case, because here the petition, though not followed automatically by adjudication, was in fact so followed; and though adjudication was not the necessary consequence, it was a consequence, and also the very consequence which was contemplated by the bankrupt. Though not automatically, it followed in the natural course of events, and because of his bankruptcy, which was his own act. It seems to me, therefore, that the principle of *In re Amherst's Trusts* (3) applies, and that here the petition was an "alienation" causing a forfeiture under this will.

Solicitors: *Burch, Whitehead & Davidsons; Coode, Kingdon & Cotton, for Crompton & Co., Exeter; R. Ellis Cunliffe; Ravenscroft, Woodward & Co.; Field, Roscoe & Co.*

(1) [1901] 2 K. B. 16, 22. (2) 17 Q. B. D. 275. (3) L. R. 13 Eq. 464.

C. C. M. D.

In re LANCASHIRE, DERBYSHIRE AND EAST COAST RAILWAY ACTS, 1891 TO 1896, AND *In re* LINCOLN AND EAST COAST RAILWAY ACTS, 1897 TO 1902.

FARWELL J.
1903
Oct. 26.

[1891 L. 2553.]

Practice—Costs—Railway Company—Parliamentary Deposit—Abandonment—Costs of Inquiries necessary for Distribution of Deposit.

By a railway company's Act and the Act for its abandonment the parliamentary deposit was directed to be applied in payment, first, of compensation to landowners, and, secondly, of creditors, and subject thereto to be repaid to the depositors. The depositors took out a summons for distribution of the deposit, and an order was made directing inquiries whether there were any landowners or others entitled to compensation, and any debts which ought to be paid out of the deposit. These inquiries were conducted by the depositors, and resulted in a certificate that no one was entitled to compensation; that the claim of one creditor must be disallowed, but there were debts which ought to be paid out of the deposit exceeding its amount:—

Held, on a summons taken out by the depositors, that they could not be allowed the costs of the inquiries in priority to payment of the creditors' debts.

In re Wrexham, Mold and Connah's Quay Ry. Co., [1900] 1 Ch. 261, distinguished.

THE Lincoln and East Coast Railway and Dock Company (hereinafter called the Lincoln Company) was incorporated by a private Act of 1897 to take over a part of the undertaking of the Lancashire, Derbyshire and East Coast Railway Company (hereinafter called the Lancashire Company). By an agreement scheduled to the Lincoln Company's Act it was agreed that 20,499*l.* New Consols, part of the original parliamentary deposit made by the depositors on behalf of the Lancashire Company, should be appropriated as the parliamentary deposit required by the Standing Orders for the Lincoln Company. The Lancashire Company had, in pursuance of this agreement, assigned all their rights in the deposit to the Lincoln Company, but it still stood in court to the credit of Ex parte the Lancashire Company.

The depositors and the Lincoln Company had mortgaged

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the deposit for 23,000*l*. This mortgage had been transferred to Messrs. Coutts & Co. by a deed to which the depositors, as well as the Lincoln Company, were parties, and they had made themselves personally liable for payment of the mortgage debt.

The Lincoln Company's undertaking was abandoned in 1902 under the authority of the Lincoln and East Coast Railway and Dock Company Abandonment Act, 1902. By the provisions of the Lincoln Company's Act of 1897 and the Abandonment Act, the deposit was directed to be applied, on the abandonment of the railway, (1.) in payment of compensation to landowners and other persons entitled thereto; (2.) at the discretion of the Court as part of the assets of the company for the benefit of its creditors, and subject thereto to be repaid to the depositors.

On July 2, 1902, upon a summons taken out by the depositors for the distribution of the deposit, the Court made an order directing inquiries whether there were any landowners or other persons entitled to compensation, and what sums ought to be paid for compensation, and whether there were any and what debts of the company which ought to be paid out of the fund in court, and gave liberty to all persons interested to apply as to the distribution of the fund.

The inquiries were proceeded with by the depositors, who had the conduct of the proceedings.

In December, 1902, the Louth and East Coast Railway Company, who claimed to be creditors of the company, obtained liberty to attend the proceedings.

In answer to the inquiries the Master, on March 30, 1903, certified that there were no persons entitled to compensation, and that there were debts of the company which ought to be paid out of the deposit amounting to 29,038*l*.; the claim of one creditor was disallowed, but the claims of Messrs. Coutts & Co. and the Louth and East Coast Railway Company were both allowed and included in this sum.

This summons was then taken out by the depositors, asking for payment of their costs and distribution of the residue of the fund among the creditors in proportion to their debts.

R. J. Parker, for the depositors. The depositors have conducted these proceedings for the benefit of every one interested in the fund; no creditor could get anything until these inquiries were made. The creditors have benefited by the clearing away of the prior claims of persons entitled to compensation, and the rejection of one creditor's claim. The depositors are in the position of the plaintiff creditor in an administration, who always gets his costs in priority to the payment of debts when the estate is insolvent. Costs were allowed to the company in a similar case in *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1), and that case also shews that the Court has jurisdiction to order costs to be paid out of this fund.

Bryan Farrer, for Messrs. Coutts & Co.

Upjohn, K.C., and *Clauson*, for the Louth and East Coast Railway Company. We do not dispute the jurisdiction; but the depositors here are not in a position analogous to the plaintiff in a creditor's administration action; they can take nothing till all the creditors are paid, and they are personally liable for some at least of the debts. The true analogy is that of a mortgagor in a redemption action where there are several mortgagees, or the owner of an incumbered estate taking proceedings to clear off the incumbrances. Costs are never allowed in those cases.

G. H. Devonshire, for the two railway companies.

R. J. Parker, in reply.

FARWELL J. The application of this deposit is governed by the Act of 1897, and to some extent by the Act of 1902. The inquiries which were necessary to clear the fund and ascertain the rights of all parties were directed on the application of the depositors. These persons have no claim until the landowners and the creditors of the company have been cleared away. They claim the costs of the inquiries by which they have cleared away the claims of the landowners and some creditors, and established the right of the creditors whose claims have been allowed. Mr. Parker argued that the creditors have taken the benefit of these inquiries, and that the costs incurred

(1) [1900] 1 Ch. 261.

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by the applicants in taking the inquiries ought to be allowed before the creditors get anything. He referred to the well-known class of cases relating to the administration of the insolvent estate of a deceased person. But those cases seem to me different from the one before me. Where one of a class, who have the same interests, conducts the proceedings, the others cannot take the benefit of his work without paying the costs which he has incurred in doing it. It is quite another thing to say that a debtor, or a surety, can claim that creditors should pay, in priority to their own debts, the costs he has incurred for the purpose of establishing his right to a fund by clearing off prior claims. The true analogy to the present case must be sought in the case of an incumbered estate or of principal and surety. In such a case I apprehend that neither the mortgagor nor the surety ever gets costs in priority to the creditors. Mr. Parker relied on *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1); but that case stands on a different footing. An order had been made in that case giving the railway company leave to attend the proceedings in an action and arbitration, and it is plain from the judgment of Lindley M.R. that the Court of Appeal treated that order as giving the company leave to defend the proceedings on behalf of the creditors and all persons interested. The case does not decide that a debtor or surety can obtain costs before the creditor is paid in full, unless those costs have been incurred in pursuance of an order of the Court made with the assent of the creditors and resulting in the benefit of all the creditors.

In the present case the applicants are sureties, and have initiated the whole proceedings for the benefit of themselves. It is impossible to order that any costs of these inquiries should be paid until the creditors are paid in full.

Solicitors: *Lowe & Co.; Farrer & Co.; Collyer-Bristow & Co.; Devonshire, Monkland & Co.*

(1) [1900] 1 Ch. 261.

J. R. B.

In re GEIPEL'S PATENT.

BUCKLEY J.

1903

June 23, 24, 25, 27.

Patent—Disclaimer—Revocation—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20.

A petition was presented for the revocation of a patent granted in 1893. The complete specification contained references to several annexed plans or figures. One of the figures purported to shew a mode of working the invention which in practice was shewn to be unworkable. Another figure shewed a mode of working which was on a principle different from the principle on which the provisional specification was framed, and this part of the claim was held bad for disconformity. It was held that the patent would be good on its being amended by a disclaimer in respect of the two parts of it above mentioned :—

Held, that the proper order was that the patent should be revoked, unless within three months from its date, or such further time as the Court might allow, the patentee should obtain leave to amend his patent by disclaimer, but on the terms that no injunction should be asked in any action brought for infringement of the patent in respect of any articles made prior to the date of the order, unless (using the words of s. 20 of the Patents, Designs, and Trade Marks Act, 1883) the patentee should "establish to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge."

In this case a petition was presented for the revocation of letters patent (No. 7860 of 1893) granted to William Geipel for improvements in steam traps, which are devices used in connection with steam pipes or cylinders to allow of the removal from the pipes or cylinders of water arising from the condensation of the steam therein.

In his provisional specification the inventor relied on, as the essence of his invention, the principle of differential expansion.

To the subsequently filed complete specification certain plans or figures were annexed. Figure 2 described a mode of using the invention which in practice could not be made to work, and was absolutely useless. His Lordship accordingly held that figure 2 must be disclaimed.

Figure 6 pointed out a mode of using the invention which was based on the principle, not of differential, but controlled expansion, and his Lordship held that the claim in respect of

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this mode of user was bad on the ground of disconformity with the provisional specification. He accordingly held that figure 6 must be disclaimed.

Subject as above, his Lordship held that the complete specification claimed for an invention founded on the principle of differential expansion, and in his judgment, delivered on June 25, 1903, he proposed making an order for revocation in the usual form, namely, unless within a certain period the patentee should obtain leave to amend his specification by disclaiming the objectionable parts of it.

T. Terrell, K.C., Astbury, K.C., and *J. H. Gray,* for the petitioners. We ask that the order may be made in the form sanctioned by the House of Lords in *Deeley* v. *Perkes* (1) subject to a slight variation. The order in that case was that the patent should be revoked unless within a certain time the patentee obtained leave to amend his specification by disclaiming, and "that if the specification be amended no action shall be brought for infringement of the patent in respect of any guns or parts of guns made prior to" a certain date. We claim that the words "or maintained" should be inserted after the word "brought," to cover any pending action.

Where there is a disclaimer, the patent is only valid as from the date of the amendment by disclaimer. There is no express enactment to that effect, but it may be gathered from s. 20 of the Patents, Designs, and Trade Marks Act, 1883. (2)

(1) [1896] A. C. 496, 500.

(2) Sects. 19 and 20 of the Act are as follows:—

Sect. 19: "In an action for infringement of a patent, and in a proceeding for revocation of a patent, the Court or a judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed."

Sect. 20: "Where an amendment by way of disclaimer, correction, or explanation has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge."

In *In re Pitt's Patent* (1) the owner of a patent had brought an action for infringement, and the defendants had petitioned for revocation. There the plaintiffs asked for liberty to apply to amend by disclaimer, and the Court of Appeal imposed a condition similar to that which was imposed in *Deeley* v. *Perkes*. (2)

An appeal was brought in *In re Pitt's Patent* (1) to the House of Lords, which refused to overrule the discretion which the Court of Appeal had exercised. (3)

In *In re Allison's Patent* (4) the order made was wider in its terms than that which was made in *Deeley* v. *Perkes* (2), and was "that the applicants be at liberty to apply to the Comptroller-General of Patents to further amend the specification . . . . upon the following terms, namely, no action is to be brought on the amended specification against the respondents or their customers in respect of the sale or user of" certain things "used or sold, or contracted to be sold, down to the date of this order, or in respect of the sale or use of any such paper bought, or contracted to be bought, by the said respondents before March 28, 1900, whether waxed or unwaxed, sold, or used before or after such date, and whether delivery has been yet taken or not." And the Court of Appeal declined to overrule the discretion of the judge.

In the present case there is a claim for a machine that will not work, and the patent is therefore bad. The patentee under these circumstances cannot be said to have framed his patent with reasonable skill and knowledge.

[BUCKLEY J. Suppose you have infringed the part of the patent which is good, or will be good after the other part is disclaimed, why should you not be restrained from selling machines made in infringement of the good part—assuming you have a stock of the infringing articles in hand—upon similar terms to those imposed by s. 20 in respect of damages?]

It would not be fair, because the applicant was at the time acting strictly within his rights when he made the machines, and that would be depriving him of his rights.

(1) [1900] 1 Ch. 508.
(2) [1896] A. C. 496, 500.
(3) (1900) 17 Rep. Pat. Cas. 745.
(4) (1900) 17 Rep. Pat. Cas. 297, 513.

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[BUCKLEY J. The same remark would apply to a case under s. 20. Is not the principle that it is fair that a man who has really described his invention ought to be protected, although there is also in his patent something which is bad?]

Sect. 18, sub-s. 9, says that "leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall in all Courts and for all purposes be deemed to form part of the specification." That means that the validity of the amended claim must be determined in the same way and upon the same footing as if it had formed part of the original specification: *Moser* v. *Marsden*. (1)

[BUCKLEY J. The document is to be construed as if it had from first to last stood as it stands after amendment, but it will not have that effect as at a date before amendment.]

Sect. 20 is directed to amended claims under s. 18, where the patentee amends voluntarily and perhaps unnecessarily, and does not deal with the Court's discretion under s. 20. We are entitled to something more than what the Court proposes to give us. The bad patent in this case has been running for ten years, and in this period we have established a trade in these articles. The owner of the invention does not bring an action against us, but threatens and intimidates our customers. We are entitled to protection for our trade. In three cases the order framed as in *Deeley* v. *Perkes* (2) has been made, and there are circumstances here justifying a similar order. As no action is brought against us, we are compelled to apply for revocation; but injunctions against our customers should be prevented.

Damages have never been given where the amendment has been in consequence of disconformity.

Moulton, K.C., and *A. J. Walter*, for the respondent. We are quite prepared to accept the order suggested by the Court, both as regards damages and an injunction. The circumstances in *Deeley* v. *Perkes* (2) were special, and we object to

(1) (1895) 13 Rep. Pat. Cas. 24, 31. (2) [1896] A. C. 496, 500.

an order in that form. The petitioners did not commence their business with the knowledge that the patent was bad.

BUCKLEY J. In this case I delivered judgment on June 25 to the effect that this patent be revoked unless, within three months, or within such further time as the Court may allow, the patentee obtain leave to amend his specification by making certain disclaimers which I then indicated. The case was adjourned until to-day in order that I might hear an argument as to whether I ought in that order to impose any and what terms under s. 19 of the Patents, Designs, and Trade Marks Act, 1883.

In *Deeley* v. *Perkes* (1) the House of Lords imposed the terms "that if the specification be amended no action shall be brought for infringement of the patent in respect of any guns or parts of guns made prior to the 19th day of July, 1896," that being the date at which the appeal was heard—that is to say, that the person who had manufactured articles coming within that which, when the disclaimer had gone through, would become a valid patent, should not be sued in respect of manufacture taking place before the date of the order which gave the patentee an opportunity of setting himself right by disclaimer.

In *In re Pitt's Patent* (2) the form of order in *Deeley* v. *Perkes* (1) was under discussion, and the Court of Appeal held that the form of order in that case was not to be adopted as a common form. Lindley M.R. said: "It does not at all follow that it would be proper to impose those terms in other cases simply because liberty is asked to apply for leave to amend a specification by way of disclaimer or otherwise"—by which I understand him to mean that it is not a matter of course to leave the person who, when the patent has been amended by disclaimer, would thereafter be an infringer, if he did the acts complained of, in possession of the profits of his having done all those acts when the patent was invalid for want of disclaimer, but that there must be special circumstances to justify such an order. He went on to discuss what

(1) [1896] A. C. 500. (2) [1900] 1 Ch. 508, 513.

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the special circumstances of the case before him were; and ultimately the Court of Appeal made an order in the same terms as that in *Deeley* v. *Perkes*. (1)

The discretion which I have to exercise is under s. 19 of the Patents, Designs, and Trade Marks Act, 1883, which contemplates that the Court may, on finding that the patent requires a disclaimer in order to make it valid, instead of dealing with the matter at once, direct the hearing of the petition to be postponed until a disclaimer has been made, and impose terms upon the postponement, and then, after the disclaimer has been made and perfected, can hear the petition, deal with it on the new state of facts, and refuse to make any order upon the petition. Of course, it is a mere matter of convenience to deal with the matter now by directing that the patent be revoked unless something happens. Such a course has the same effect as a postponement of the hearing to a subsequent time. The question I have to consider is really this: I have a discretion, and I have to consider what is fair as between the parties. Thinking, as I do, that I ought to give the patentee an opportunity of disclaiming, I have also to consider this: Ought, as in *Deeley* v. *Perkes* (1), the infringer, so to call him—the person who would have been an infringer if the patent had been rendered valid by disclaimer—to be left in possession of the goods which he has manufactured under the infringed patent and be allowed to sell them, or ought he to be exposed to an action in respect of them? Under special circumstances he ought to be protected against an action: that is shewn by *In re Pitt's Patent* (2) and *Deeley* v. *Perkes*. (1) Under ordinary circumstances it does not follow that he ought to be protected in respect of them. I have held that this patent requires disclaimer in respect of two matters. One of these is figure 2, which represents a supposed particular mode of working the invention, which in fact will not work and is of no good to anybody. The patentee has claimed it, but it is useless, and must therefore be disclaimed. Well, the infringer, as I shall continue to call him—not forgetting, of course, that he was not an infringer when he did what is complained of—has not

(1) [1896] A. C. 500. (2) [1900] 1 Ch. 508, 513.

used figure 2, but he has used the other part of the invention, which will work. Then there is figure 6, on which the question of disconformity was raised. There the patentee has included in his claim a particular way of producing the distortion which he desires, and which I have held to be not such as was described in the provisional specification, and to be wrong on the ground of disconformity. It seems to me that what I have to consider is this: If the man whom I have, in the sense in which I have used the word, called an "infringer," has availed himself of that part of the patent which by disclaimer will become good, is it fair, as between that infringer and a person who will become the patentee, that the former should be allowed to go on and sell goods made in infringement of that which will after disclaimer be a valid patent? If he has availed himself neither of figure 2 nor of figure 6, but only of other parts of the patent, and the "original claim was framed in good faith and with reasonable skill and knowledge," so as to point that out as a desirable thing to do, it seems to me that it is fair that there should be room to restrain him, or those who are dealing with his goods, from disposing of the goods thus made. Sect. 20 has nothing to do with the case with which I have to deal, except, as it appears to me, that it indicates a line upon which I may exercise my discretion. The effect of s. 20 is this. Suppose a disclaimer is made, and then an action is subsequently brought, damages may be given in respect of the use of the invention before the disclaimer in a certain event, and except in that event damages cannot be given. There is power to give damages for doing an act which at its date was rightful, because the patent required disclaimer, but which, so to speak, becomes wrongful when the disclaimer is passed if it is proved that "the original claim was framed in good faith and with reasonable skill and knowledge." I think that I ought to make an order here in a form similar to that—that is to say, that I ought to protect those whom I have called the infringers from injunction if the original claim was not framed in good faith and with reasonable skill and knowledge; but if it was so framed, then it seems to me that it is fair that the person

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whom I have called the infringer should be exposed to an injunction in an action brought for an injunction under circumstances similar to those in which, if the case fell within s. 20, he might have been exposed to damages. I therefore make an order in this form—that if the specification be amended no injunction shall be asked in any action brought for infringement of the patent in respect of any steam traps made prior to this date—to-day—unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge. I put the order in that form because, of course, I cannot control any subsequent judge who may have to deal with such an action; but I can control the plaintiff in that action, and I impose the term upon him that he shall not ask for the injunction in those circumstances. I therefore make the order in that form.

Solicitor for petitioners: *Frank Evelyn Jones, for W. T. Hill, Manchester.*

Solicitors for respondent: *Faithfull & Owen.*

F. E.

Considered. In re POWER'S SETTLEMENT TRUSTS [1951] 1 Ch. 689

MONTEFIORE *v.* GUEDALLA.

BUCKLEY J.

1903

Oct. 26.

[1858 M. 165.]

Trustee—Appointment of New Trustees—Donee of Power appointing Himself—Validity of Appointment.

There is no rule that a donee of a power to appoint new trustees is unable to appoint himself. The Court will sanction such an appointment in special circumstances.

ADJOURNED SUMMONS.

Judah Guedalla by his will made in 1839, after various pecuniary dispositions, gave all his residuary property to Sir Moses Montefiore, Moses Montefiore, and Abraham Mocatta upon trust for sale and conversion into Government stock, and to stand possessed thereof upon certain trusts; and the testator declared that "on the death, refusal, or incapacity to act of any of them my said trustees hereinbefore named, or of any trustee or trustees to be appointed in their or any of their places or steads, or if any or either of such trustees shall be desirous of retiring from his trusteeship, it shall be lawful for the acting trustee or trustees for the time being of this my will or the executors or administrators of the last acting trustee to appoint a new trustee or trustees in the place or stead of such trustee so dying, refusing or becoming incapable to act or wishing to retire as aforesaid," and directed that the trust funds should thereupon be transferred to the new trustees.

Judah Guedalla died in 1858. New trustees were appointed in 1860; and Sir Joseph Sebag Montefiore eventually became the sole surviving trustee. He died on January 18, 1903, having by his will appointed Edward Sebag Montefiore, Cecil Sebag Montefiore, Sir Samuel Montagu, and Richard Dawes his executors.

Sir J. S. Montefiore's executors now desired to appoint, under the above-mentioned power, Cecil Sebag Montefiore, I. Spielmann, and S. I. Cohen to be trustees of the will of Judah Guedalla, and, having regard to the fact that the estate was being administered by the Court and that Cecil Sebag

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Montefiore was himself one of the appointors, they took out this summons in the action asking for liberty to make the appointment.

It was stated that both as a near relative and as a man of business Cecil Sebag Montefiore was a most desirable person to be made a trustee, and that he was well acquainted with the trusts, and had no pecuniary interest in Judah Guedalla's estate.

A. H. Jessel, for the summons. All the parties interested are anxious to appoint Mr. C. S. Montefiore; but a doubt has been suggested whether the executors have power to appoint one of their number. The doubt arises from the decision of Kay J. in *In re Skeats' Settlement* (1) to the effect that a power of appointing new trustees is fiduciary and that the donee of such a power cannot appoint himself. The learned judge, however, did not in that case say that the donee was unable to appoint himself, but that it was improper for him to do so. In special circumstances the Court will sanction such an appointment: Farwell on Powers, 2nd ed. p. 654. In *Tempest* v. *Lord Camoys* (2) Chitty J. said that donees of a power of appointment of new trustees could appoint one of themselves, and Kay J. did not in *In re Skeats' Settlement* (1) refer to or differ from that decision although it was cited to him. In *In re Newen* (3) Kekewich J. followed *In re Skeats' Settlement* (1), but he made an order on the footing that the appointment of herself by the donee of the power was effective and must be got rid of by her retirement. Therefore such an appointment is not void, but voidable, and it can be sanctioned by the Court. There is nothing in the language of the power to prevent the appointment. [He also referred to *Forster* v. *Abraham*. (4)]

G. S. Alexander, for all the persons beneficially interested, supported the application.

BUCKLEY J. This is a question which arises on an application for the sanction of the Court to an appointment of new

(1) (1889) 42 Ch. D. 522.
(2) (1888) 58 L. T. 221.
(3) [1894] 2 Ch. 297.
(4) (1874) L. R. 17 Eq. 351.

trustees. There were certain trustees of whom Sir Joseph Montefiore was the survivor. He died, having by his will appointed four executors of whom Cecil Sebag Montefiore is one. The four executors are desirous of exercising their power of appointing new trustees of the will of Judah Guedalla, and are minded to appoint three persons of whom Cecil Sebag Montefiore is one. The only questions I have to decide are whether it is competent to the four executors to appoint as new trustees three persons, of whom one is himself an appointor; and, if so, whether it is proper that they should so exercise that power. Mr. Jessel has cited a number of cases bearing on the point, and I have considered them with a view to seeing whether the Court has ever laid it down that the donee of a power of appointing new trustees cannot appoint himself. I say emphatically "cannot," for the question is not whether it is improper for him to do so, but whether he cannot do so, in the sense that he is outside the class of persons who are capable of being appointed. I do not think the Court has ever laid that down. The first step is to look at the language of the power. Where you find that the power is to appoint some "other" person, the question may arise whether that means some person other than the appointor. In such a case the donee of the power may not be amongst the persons capable of being appointed. But in the present case the word "other" does not appear. The words of the power are simply, "to appoint a new trustee or trustees"; so that by the language of the instrument the executors who are the appointors are not excluded from the class. On the cases, I am clearly of opinion that it has not been laid down that the appointors are outside the class who can be appointed, although it has been said, and it is a very salutary rule, that an appointor ought not, save in exceptional circumstances, to appoint himself. The principal case on the subject is *In re Skeats' Settlement* (1), decided by Kay J. in 1889, where the head-note states that it was held "that a power of appointing new trustees being fiduciary, the donee of such a power cannot appoint himself."

(1) 42 Ch. D. 522.

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That does not accurately represent the judgment. The decision was not that he cannot appoint himself, but that he ought not to do so unless the circumstances are exceptional. I need not travel through the judgment. It is plain that if the learned judge had meant that an appointor had no power to appoint himself, he must in the earlier part of his judgment, where he is considering the general question apart from the word "other," have considered and differed from the judgment of Chitty J. in *Tempest* v. *Lord Camoys* (1), which had been decided the year before and was cited to him; for in that case Chitty J. proceeded on the footing that it was competent to the appointors to appoint one of their number to be a trustee. He made the appointment "under both—that is to say, under the jurisdiction of the Court and under the power." If Kay J. intended to differ from that decision, he must have referred to it in his judgment.

The other case referred to was *In re Newen* (2), decided by Kekewich J. There the opinion of the learned judge is plainly shewn. The circumstances were that one of the persons who had the power to appoint new trustees had joined in appointing herself a new trustee. The Court was asked to hand over the trust funds to the trustees, and declined to do so so long as she remained a trustee. The learned judge said that the proper course would be that she should retire from the trusts. He did not hold that she was not in occupation of the office, but on the contrary called upon her to divest herself of an office to which he held that she had been improperly appointed. In my opinion the result of the cases is that it is competent to persons who have a power of appointment of new trustees to appoint one of themselves where the language of the instrument creating the power allows them to do so, although, as I have said before, it is a most salutary rule that they should do so only in special circumstances.

In the present case there is an administration action, and the parties have had to come to the Court to ask it to sanction the appointment. I hold that the appointment of Cecil Sebag

(1) 58 L. T. 221.

(2) [1894] 2 Ch. 297.

Montefiore is within the language of the power, and that in the circumstances it will be a proper exercise of the power; and I therefore give the executors liberty to make the appointment.

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Solicitors: *Emanuel & Simmonds.*

H. C. R.

In re MARQUIS OF ANGLESEY. COUNTESS DE GALVE *v.* GARDNER.

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Aug. 5, 6, 12.

[1901 A. 607.]

Receiver — Equitable Execution—Effect of Order—Unascertained Residue — Fund partly in Court—Notice to Executor—Subsequent Mortgagees and Judgment Creditors—Stop Order—Charging Order—Priority.

A receivership order obtained by a judgment creditor by way of equitable execution over a judgment debtor's share of a testator's residuary personal estate, partly in court in an administration action and partly in the hands of the executor who has direct notice of the order, though not creating a charge, prevents the judgment debtor from receiving the share, or from dealing with it to the prejudice of the judgment creditor, and if, at the date of the receivership order, the residue is unascertained and the fund then in court is insufficient for the testator's debts, so that the judgment debtor's share cannot then be taken in execution or made available by any other legal process, it prevents any subsequent mortgagee or judgment creditor from gaining priority by means of a stop order or charging order.

SUMMONS to vary master's certificate.

By his will dated August 1, 1898, the fourth Marquis of Anglesey, after bequeathing an annuity of 140*l.* to Robert Kearley for his life, bequeathed his residuary personal estate to the plaintiff, devised his real estate to the defendant, the fifth Marquis, and appointed the defendant Gardner his executor.

The testator died on October 13, 1898, and on May 1, 1899, an order for the administration of his personal and (if necessary) of his real estate was made in a creditor's action, *In re Marquis of Anglesey. Willmot* v. *Gardner*, [1899 A. 552].

The personal estate was gradually realized and paid into court to the credit of the action.

By the order on further consideration dated February 9,

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1901, the testator's debts certified by the master's certificate of January 15, 1901, and amounting to 69,895*l.*, were ordered to be paid, and the costs were ordered to be taxed and paid.

As it appeared that after payment of these debts and costs the amount coming to the plaintiff would be wholly insufficient to satisfy her own creditors and incumbrancers, an order for general administration of the personal estate and (if necessary) of the real estate, which was liable to recoup the personal estate for part of the money paid in discharge of a mortgage on certain portions of the real and personal estate, was made in the present action on June 10, 1901.

On June 5, 1902, an order was made in the creditor's action directing that the net residue, after payment of the arrears of the annuity and taxed costs, should be carried over to the credit of the present action, subject to restraints imposed by stop orders and charging orders obtained subsequent to the order on further consideration by certain mortgagees and judgment creditors of the plaintiff.

On July 18, 1902, a life annuity of 140*l.* was ordered to be purchased for Robert Kearley out of the funds in court.

It appeared that on July 18, 1899, prior to the date of any of the mortgages or judgments on which the above restraints were obtained, Hartog obtained an order appointing a receiver of the plaintiff's interest in the residuary personal estate without prejudice to the rights of prior incumbrancers, and the receiver was directed to apply any moneys received by him in satisfying two judgments for 2744*l.* obtained by Hartog against the plaintiff in June, 1899. Notice of this order was given to the executor on the same day, and the order was served on his solicitors on July 19, 1899. At that time the executor had only 17,000*l.* in hand, and there was 40,000*l.* in court. The residue being still unascertained, and the 40,000*l.* in court being insufficient for the testator's creditors, Hartog did not obtain a charging order or stop order.

Further sums were subsequently received by the executor and paid into court, the fund now in court having all been paid in in the creditor's action since the date of the receivership order.

On February 27, 1903, the master made his general certificate, giving Hartog priority in respect of his receivership order over the subsequent mortgagees and judgment creditors who had obtained restraints.

Poitevin, a judgment creditor who had obtained both a stop order and a charging order, took out this summons to vary the certificate (inter alia) by postponing Hartog's claim, the mortgagees and the other judgment creditors who had obtained restraints adopting and claiming the benefit of the summons on this point.

Austen-Cartmell, for the plaintiff, stated the facts.

J. G. Wood, for Poitevin. A receivership order is not a form of execution, but merely a form of equitable relief granted in cases where there is any impediment to common law execution: *In re Shephard.* (1)

It creates no charge: *In re Dickinson* (2); *In re Potts* (3); *Flegg* v. *Prentis* (4); and notice to the trustee of the fund confers no priority: *Arden* v. *Arden.* (5)

Even in the case of a charge, if part of the fund is in court, priority can only be secured by giving notice to the trustee and obtaining a stop order: *Mutual Life Assurance Society* v. *Langley* (6); *Mack* v. *Postle* (7); *Stephens* v. *Green.* (8)

Hartog's claim must therefore be postponed.

Maugham, for Hartog. In July, 1899, a receivership order was the only remedy open to Hartog. He could not have obtained a charging order, as the net residue was not ascertained: *Dixon* v. *Wrench* (9), distinguishing *Cragg* v. *Taylor* (10); and a stop order would have been nugatory, as the 40,000*l.* then in court was insufficient for the testator's creditors. Although the receivership order did not create a charge, it prevented the plaintiff from receiving the fund: *Tyrrell* v.

(1) (1889) 43 Ch. D. 131.
(2) (1888) 22 Q. B. D. 187.
(3) [1893] 1 Q. B. 648.
(4) [1892] 2 Ch. 428.
(5) (1885) 29 Ch. D. 702, 709.
(6) (1886) 32 Ch. D. 460, 469, 471, 473.
(7) [1894] 2 Ch. 449, 455.
(8) [1895] 2 Ch. 148, 159.
(9) (1869) L. R. 4 Ex. 154.
(10) (1867) L. R. 2 Ex. 131.

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Painton (1); *Levasseur* v. *Mason & Barry, Limited* (2); and therefore she could not authorize any one else to receive it. The equitable execution thereby obtained required no stop order to perfect it: *In re Galland.* (3) The receivership order coupled with notice to the executor constituted a prior equity in respect of the fund then or thereafter in his hands, which equity, being analogous to a charge, could not be affected by subsequent restraints placed on the fund after its transfer into court: *Brearcliff* v. *Dorrington* (4); *Livesey* v. *Harding.* (5)

Ashton Cross, Le Riche, Edward Bray, Ashworth James, Edward Beaumont, and *William Baker,* for other parties attending.

J. G. Wood, in reply. A receivership order is not analogous to a charge, and a subsequent mortgagee or judgment creditor may obtain priority by means of a stop order or charging order.

Cur. adv. vult.

Aug. 12. SWINFEN EADY J. On July 18, 1899, Hartog obtained an order appointing a receiver of the plaintiff's interest in the residuary personal estate of the fourth Marquis of Anglesey, without prejudice to the rights of prior incumbrancers; and that receiver was ordered to apply any moneys received by him in satisfying two judgments obtained by Hartog against the plaintiff for 2744*l.* Notice in writing of this order was given on the same day to the executor of the Marquis. The effect of an order appointing a receiver, by way of equitable execution, has been often considered. It does not make the judgment creditor a secured creditor within the meaning of the Bankruptcy Act, 1883, and it does not create a charge: *In re Dickinson* (6); *In re Potts.* (7) If the judgment debtor is a company, and an order to wind up the company be made before the order appointing a receiver has been acted on, the judgment creditor will not be a secured creditor in the

(1) [1895] 1 Q. B. 202, 206.
(2) [1891] 2 Q. B. 73, 80.
(3) W. N. (1886) 96.
(4) (1850) 4 De G. & Sm. 122.
(5) (1856) 23 Beav. 141.
(6) 22 Q. B. D. 187.
(7) [1893] 1 Q. B. 648.

winding-up ; nor, in the absence of special circumstances, will the Court, in the exercise of its discretion under s. 87 of the Companies Act, 1862, allow the order to be further proceeded with : *Croshaw* v. *Lyndhurst Ship Co.* (1) But, on the other hand, the order appointing a receiver operates as an injunction to restrain the judgment debtor from himself receiving the moneys over which the receiver is appointed: *Tyrrell* v. *Painton* (2), per Lindley L.J.; and in my opinion it prevents the debtor from dealing with the moneys to the prejudice of the judgment creditor; and it also prevents any subsequent judgment creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor cannot be taken in execution or made available by any other legal process. The case of *Levasseur* v. *Mason & Barry, Limited* (3) (in the Court of Appeal) shews the advantage of obtaining such an order. In that case judgment creditors had obtained the appointment of a receiver of certain copper, which was subject to a lien, and subsequently the debtors were adjudicated to be in judicial liquidation in France, and the plaintiffs were appointed liquidators. The order, as varied by the Divisional Court and affirmed by the Court of Appeal, did not contain any direction to pay the judgment debt; and, moreover, nothing whatever had been received by the receiver before the appointment of the plaintiffs as liquidators. It was nevertheless held by the Court of Appeal that the judgment creditors, and not the liquidators, were entitled to the proceeds of the copper, Lord Esher stating (4) that the receivership order had the effect of giving to the judgment creditors a right to have the property in dispute handed to them after a certain difficulty had been got rid of. At the time when Hartog obtained the appointment of a receiver there was no other method open to him of taking in execution the plaintiff's share of the residuary estate of the Marquis. The difficulty in his way was that the debts of the Marquis, the annuity, and the costs must be paid or provided for before the residuary estate which belonged to the plaintiff

(1) [1897] 2 Ch. 154.
(2) [1895] 1 Q. B. 202, 206.
(3) [1891] 2 Q. B. 73.
(4) Ibid. 80.

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could be ascertained. The case of *Dixon* v. *Wrench* (1) shews that he could not have obtained a charging order under the statutes 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82. And there was not any fund in court which could be affected by any charging order or stop order, as at that date only 40,000*l.* had been paid into court in the creditor's action of *Willmot* v. *Gardner*, and that amount was not nearly sufficient to pay the testator's creditors, who had the first claim upon that fund. The question then arises—Has any other person subsequently obtained priority over Hartog? It is well settled that an execution creditor is not in the position of a purchaser, and the rule of obtaining priority by notice does not apply to him. An execution creditor takes subject to all prior equities: *Scott* v. *Lord Hastings* (2); *Arden* v. *Arden*. (3) Even in the case of mortgagees, if when they take their security they give proper notice of it to the trustees, and the funds are not in court, they will not be postponed by a subsequent incumbrancer obtaining the first stop order after the subsequent transfer of the funds into court: *Livesey* v. *Harding*. (4) The effect of a garnishee order is to give the garnishor a lien on the debt: per Cotton L.J. in *In re Combined Weighing and Advertising Machine Co.* (5) But a garnishee order can only bind so much of the debt as the judgment debtor can honestly deal with when the order is obtained and served, and does not affect the claims of creditors in whose favour he has charged the debt, though they have not given notice of their claim: *In re General Horticultural Co.* (6); *Badeley* v. *Consolidated Bank* (7); *Davis* v. *Freethy*. (8) The same rule must be applied to charging orders obtained under the statutes 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, as to garnishee orders. They are both processes of execution to enforce payment of money under a judgment or order, and the execution creditor can only obtain what the judgment debtor can honestly give him. The persons who have obtained charging orders or stop orders on

(1) L. R. 4 Ex. 154.
(2) (1858) 4 K. & J. 633.
(3) 29 Ch. D. 702, 709–10.
(4) 23 Beav. 141.
(5) (1889) 43 Ch. D. 99, 104.
(6) (1886) 32 Ch. D. 512.
(7) (1888) 38 Ch. D. 238.
(8) (1890) 24 Q. B. D. 519.

the fund in court, all of which has been paid in since the date of Hartog's order, have not thereby obtained any priority over him. It follows that, in my opinion, Hartog has the first claim to be paid out of the fund now in court. His equitable right is prior in date to that of any other party. To decide otherwise would be to hold that an order appointing a receiver by way of equitable execution has no effect whatever, and still leaves the property to be dealt with by the debtor as he pleases, as, of course, a residuary legatee may charge or incumber his interest before the net residue is ascertained. The result is that the summons to vary fails; but as other incumbrancers have claimed the benefit of it the proper order as to costs will be to make the costs of the summons costs in the action.

Solicitors: *Langford & Fisher; Munns & Longden; McKenna & Co.; Denton, Hall & Burgin; Hubbard & Shepard; Warrens; Farrer & Co.; Harries, Wilkinson & Raikes; Fraser & Christian.*

G. R. A.

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The Accumulations Act, 1892—which provides that after the passing of the Act there shall not, under any disposition of property, be any accumulation of rents or income for the purchase of land only, for any period longer than the minority of any person who, if of age, would for the time being be entitled to such rents or income—applies to a will made before and coming into operation after the passing of the Act. *In re* BARONESS LLANOVER. HERBERT *v.* FRESHFIELD (2). - - - - **Farwell J. 330**

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ANNUITY—*Administration—Abatement—Annuities Immediate and Reversionary—Deficient Estate—Mode of Apportionment—Hotchpot.*

A testator gave an annuity of 400*l.* to his wife, to be paid in preference to all other bequests, and subject thereto he gave an annuity of 150*l.* to his son and of 450*l.* to Mrs. S. for life with remainder to her children in the proportions therein mentioned; and he gave his trustees power, if the income was insufficient, to raise the annuities by mortgage of his real estate. For five years all the annuities were paid in full, partly out of moneys raised by mortgage. The estate was then found insufficient, and for the rest of the widow's life her annuity only was paid, and this had to be paid partly out of capital. On the

ANNUITY—*continued.*
widow's death the residue of the estate was insufficient to pay the arrears of annuities. In settling the proportions of abatement the question was raised whether the sums received by the immediate annuitants during the first five years ought to be brought into hotchpot:—

Held, on principle, that as the income of the testator's estate, during the first five years after his death, could never have been applicable in payment of the reversionary annuities, the annuitants in possession were not bound to bring into hotchpot sums received out of income:

Held, also, on the construction of the particular will, that the trustees might have exhausted the whole of the estate in payment of the immediate annuities, and therefore the sums paid out of capital need not be brought into hotchpot.

Potts v. *Smith*, (1869) L. R. 8 Eq. 683, considered.

In re METCALF. METCALF *v.* BLENCOWE
Farwell J. 424

—— Tenant for life—Annuitants entitled to rents and profits of land - - - 136
See SETTLED LAND. 4.

APPEAL — Company — Winding-up petition—Costs of contributories and creditors supporting successful party - - 373
See COMPANY. 9.

—— Official referee, Whole action referred to—Judgment—Mode of appealing - 475
See PRACTICE. 2.

APPOINTMENT—Directors—Disqualified directors—Articles validating acts of de facto directors - - - - 439
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—— Power of appointment.
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APPORTIONMENT — Annuities immediate and reversionary—Deficient estate — Abatement—Hotchpot - - - 424
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APPROPRIATION — Investment — Contingent legacy without interest - - 226
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—— Payments—Investment—Breach of trust—Following trust money - - 356
See TRUSTEE. 2.

ARBITRATION—*Agreement to refer to Arbitration—Legal Proceedings—Application for Stay—Step in Proceedings—Summons for Directions—Practice—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—*Rules of Supreme Court*, 1883, *Order XXX., r.* 4.

Attendance by a defendant before the master on a summons for directions, taken out by the plaintiff, and acquiescence, without protest, in a common form order for delivery of pleadings, is taking a step in the proceedings within the meaning of s. 4 of the Arbitration Act (52 & 53 Vict. c. 49), and the defendant is thereby precluded from moving to stay proceedings under that section.

County Theatres and Hotels, Ld. v. *Knowles*, [1902] 1 K. B. 480, must be taken to lay down a general rule. RICHARDSON *v.* LE MAITRE
Swinfen Eady J. 222

ARRANGEMENT — Deeds of — Registration — Company—Creditors—Composition 590
See COMPANY. 2.

ARTICLES OF ASSOCIATION—Alteration—Special resolutions—Contract - 506
See COMPANY. 1.

ASSIGN—Restrictive covenant—Right of action by personal representative against assign of covenantor - - - 539
See COVENANT. 2.

ASSIGNMENT—Book debts—Floating charge—Debenture-holders — Priority — Mortgages - - - - 284
See COMPANY. 6.

—— Covenant not to assign without licence "not to be unreasonably withheld" — Unreasonable condition - - 112
See LANDLORD AND TENANT. 1.

—— Equitable—Priority—Notice—Stop order 26
See HUSBAND AND WIFE. 1.

ATTACHMENT — *Practice — Motion for Attachment—Affidavit in Support—Exhibits—Service of Exhibits—Undertaking—Omission to fix Time—Partnership — Committal for Non-payment of Money—Rules of Supreme Court*, 1883, *Order XLI., r.* 5; *Order LII., r.* 4—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

It is not necessary within the terms of rule 4 of Order LII. to serve copies of the exhibits to the affidavit on which a motion to attach is founded with the notice of motion and affidavit; but a party moving to attach who does not serve copies of any exhibits reasonably necessary to enable the respondent thoroughly to understand the grounds upon which the application is being made, runs the risk of having the motion dismissed on the ground that the evidence has not been properly brought to the notice of the respondent.

Where an undertaking to pay money into court or to a joint account at a bank has been given, without fixing any time for payment, an order fixing a time is necessary before the undertaking can be enforced; though there may be cases of contempt so gross as to justify attachment without any supplemental order.

An undertaking in a partnership action to pay money into court or to a joint account at a bank cannot be enforced by attachment or committal, having regard to the prohibition in the Debtors Act, 1869, s. 4, against imprisonment for default in payment of a sum of money, except in the cases specified by that section. CARTER *v.* ROBERTS - - - Byrne J. 312

ATTORNEY-GENERAL—Joinder of—Local authority—Extent of powers - 556
See BURIAL.

AUCTION—Friendly society, Mortgage to—Sale by auction—Purchase by officer of society—Invalidity - - - 647
See MORTGAGE. 2.

BANK — Debentures — Equitable incumbrancers—Notice—Priority - - 654
See COMPANY. 4.

BANKRUPTCY—Will—Forfeiture of life interest —"Alienate or incumber"—Petition in bankruptcy by tenant for life - 705
See WILL. 3.

BILL OF COSTS.
See under COSTS.

BOUNDARY—Alteration of boundaries of union —Transfer of land from one parish to another - - - - 142
See LOCAL GOVERNMENT.

BREACH OF COVENANT.
See under COVENANT.

BREACH OF TRUST.
See under TRUSTEE.

BUILDING—*Building Scheme—Restrictive Stipulations—Right to enforce—Notice.*

Where an estate is sold in lots at successive sales under a building scheme imposing restrictive stipulations on the lots, a purchaser can only enforce the stipulations against property shewn as lotted in the plan and subject to the stipulations at the sale at which he purchases.

A purchaser can enforce the stipulations, although his conveyance contains an accidental or (*semble*) an intentional departure therefrom, as, notwithstanding the form of the conveyance, the purchaser is not entitled to the benefit of this departure as against other purchasers, nor are they bound by it.

Mackenzie v. *Childers*, (1889) 43 Ch. D. 265, and *Knight* v. *Simmonds*, [1896] 1 Ch. 653; 2 Ch. 294, applied.

Semble. A sub-purchaser of part of a lot can enforce the stipulations, although, previously to his purchase, his vendor had committed a breach on another part.

Where property is sold under an open contract, and no restrictions appear on the title, the mere fact that the vendor's solicitor proposes to insert restrictive stipulations in the conveyance, which are partly waived and partly insisted on, is not sufficient to affect the purchaser or his solicitor with notice that the property is already subject to restrictions. ROWELL *v.* SATCHELL
Swinfen Eady J. 212

—— Building line—Approval of plans—"Written consent" of urban authority - 431
See STREETS.

—— Building scheme—Alteration of character of neighbourhood — Acquiescence in breaches - - - - 446
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—— Covenant—Building restrictions—One house —Double-tenement house - 522
See COVENANT. 1.

BURIAL—*Open Space—Disused Burial Ground —Adjacent Landowner—Right to Access of Light —Local Authority—Extent of Powers—Joinder of Attorney-General—Metropolitan Open Spaces Act*, 1877 (40 & 41 *Vict. c.* 35), *s.* 1—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *ss.* 4, 5—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

A borough council, in whom, under the Metropolitan Open Spaces Acts, 1877 and 1881, and the Disused Burial Grounds Act, 1884, the management and administration of a disused churchyard as an open space were vested, proposed to erect on the ground a screen for the purpose of preventing an adjoining landowner, who had built on his land houses which overlooked the churchyard, from acquiring any right of light which would diminish or injuriously affect the enjoyment by the public of the churchyard as an open space.

In an action by the Attorney-General at the relation of the landowner, and by the landowner, to restrain the erection of the screen:—

Held, that in erecting the screen the council would be holding and administering the ground otherwise than for the purpose of its enjoyment by the public in an open condition and for no other purpose, as prescribed by s. 5 of the Act of 1881, and that the council must be restrained from erecting the screen.

Semble, that the landowner could not have maintained the action in the absence of the Attorney-General.

Decision of Buckley J., [1903] 1 Ch. 109, reversed. BOYCE *v.* PADDINGTON BOROUGH COUNCIL - - - - C. A. 556

CASES:—

—— *Alexander* v. *Barnhill*, (1888) 21 L. R. Ir. 511.
Explained by C. A. MERCIER *v.* MERCIER [1903] 2 Ch. 98

—— *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656.
Principle of, applied by Byrne J. PUNT *v.* SYMONS & Co. - [1903] 2 Ch. 506

—— *Amherst's Trusts, In re*, (1872) L. R. 13 Eq. 464.
Followed by Kekewich J. *In re* COTGRAVE - - [1903] 2 Ch. 705

—— *Bishop* v. *Elliott*, - (1855) 11 Ex. 113.
Followed by C. A. LAMBOURN *v.* MCLELLAN - - [1903] 2 Ch. 268

—— *Bolton Estates, In re. Russell* v. *Meyrick*, [1902] W. N. 214.
Reversed by C. A. - [1903] 2 Ch. 461

—— *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109.
Reversed by C. A. - [1903] 2 Ch. 556

—— *Brown* v. *Adams* - (1869) L. R. 4 Ch. 764
Overruled by *In re* HALLETT'S ESTATE, (1880) 13 Ch. D. 696: *See In re* OATWAY
Joyce J. [1903] 2 Ch. 356

—— *Burrow's Trusts, In re*, (1864) 10 L. T. 184
Approved by C. A. *In re* COLEY
[1903] 2 Ch. 102

—— *Carling's Case* - (1875) 1 Ch. D. 115
Applicable. *In re* INNES & Co.
C. A. [1903] 2 Ch. 254

—— *Carr* v. *Anderson* - - [1903] 1 Ch. 90
Affirmed by C. A. - [1903] 2 Ch. 279

—— *Carritt* v. *Bradley* [1901] 2 K. B. 550
Distinguished by C. A. JARRAH TIMBER AND WOOD PAVING CORPORATION, LD. *v.* SAMUEL - - [1903] 2 Ch. 1

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—— *Castell & Brown, Ld, In re*, [1898] 1 Ch. 315
Followed by Swinfen Eady J. *In re* VALLETORT SANITARY STEAM LAUNDRY Co. - - - [1903] 2 Ch. 654

—— *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, 591.
Referred to by Joyce J. LONDON COUNTY COUNCIL *v.* SOUTH METROPOLITAN GAS Co. - - - [1903] 2 Ch. 532

—— *County Theatres and Hotels, Ld.* v. *Knowles*, [1902] 1 K. B. 480.
Explained by Swinfen Eady J. RICHARDSON *v.* LE MAITRE - [1903] 2 Ch. 222

—— *Daglish* v. *Barton* - [1900] 1 Q. B. 284
Disapproved by C. A. WYNNE-FINCH *v.* CHAYTOR - [1903] 2 Ch. 475

—— *Dawson* v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6.
Followed by Farwell J. BRITISH ASBESTOS Co. *v.* BOYD [1903] 2 Ch. 439

—— *Emmins* v. *Bradford* (1880) 13 Ch. D. 493
Approved by C. A. *In re* BRYDONE'S SETTLEMENT - - [1903] 2 Ch. 84

—— *English and Scottish Mercantile Investment Co.* v. *Brunton*, [1892] 2 Q. B. 700.
Followed by Swinfen Eady J. *In re* VALLETORT SANITARY STEAM LAUNDRY Co. - - - [1903] 2 Ch. 654

—— *Foulger* v. *Arding* [1902] 1 K. B. 700, 710
Applied by Swinfen Eady J. *In re* WARRINER - - [1903] 2 Ch. 367

—— *Fraser* v. *Whalley* (1864) 2 H. & M. 10
Principle of, applied by Byrne J. PUNT *v.* SYMONS & Co. - [1903] 2 Ch. 506

—— *Freshfield's Trust, In re*, (1879) 11 Ch. D. 198.
Approved and followed by C. A. MONTEFIORE *v.* GUEDALLA [1903] 2 Ch. 26

—— *Grace, Ex parte* - (1799) 1 Bos. & P. 376
Distinguished by C. A. *In re* BISS [1903] 2 Ch. 40

—— *Grant* v. *Langston* - [1900] A. C. 383, 399
Followed by Swinfen Eady J. ILFORD PARK ESTATES, LD. *v.* JACOBS [1903] 2 Ch. 522

—— *Hall, In re. Foster* v. *Metcalfe*, W. N. (1902) 208.
Reversed by C. A. - [1903] 2 Ch. 226

—— *Hallett's Estate, In re* (1880) 13 Ch. D. 696
Discussed by Joyce J. *In re* OATWAY [1903] 2 Ch. 356

—— *Hull, Barnsley and West Riding Junction Ry. Co., In re*, (1880) 40 Ch. D. 119, 130.
Applied by Swinfen Eady J. *In re* LISKEARD AND CARADON RY. Co. [1903] 2 Ch. 681

—— *Innes & Co., In re* - [1903] 1 Ch. 674
Reversed by C. A. - [1903] 2 Ch. 254

—— *Jarrah Timber and Wood Paving Corporation, Ld.* v. *Samuel.*
Affirmed by C. A. - [1903] 2 Ch. 1

—— *Jones* v. *Jones* - - W. N. (1874) 190
Followed by Byrne J. MALLOTT *v.* WILSON - - [1903] 2 Ch. 494

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—— *Kimber* v. *Admans* - [1900] 1 Ch. 412
Distinguished by Swinfen Eady J. ILFORD PARK ESTATES, LD. *v.* JACOBS [1903] 2 Ch. 522

—— *Kinson Pottery Co.* v. *Poole Corporation*, [1899] 2 Q. B. 41.
Considered and distinguished by C. A. WILKINSON *v.* LLANDAFF AND DINAS POWIS RURAL COUNCIL [1903] 2 Ch. 695

—— *Knight* v. *Simmonds*, [1896] 1 Ch. 653; 2 Ch. 294.
Applied by Swinfen Eady J. ROWELL *v.* SATCHELL - - [1903] 2 Ch. 212

—— *Knowles* v. *Scott* - - [1891] 1 Ch. 717
Distinguished by Farwell J. PULSFORD *v.* DEVENISH - - [1903] 2 Ch. 625

—— *Lambourn* v. *McLellan* - [1903] 1 Ch. 806
Reversed by C. A. - [1903] 2 Ch. 268

—— *Line* v. *Hall*, (1873) 43 L. J. (Ch.) 107, 108.
Dictum of Jessel M.R. in, considered and applied by Kekewich J. *In re* FINCH AND CHEW'S CONTRACT [1903] 2 Ch. 486

—— *Llanover's (Baroness) Will, In re. Herbert* v. *Freshfield*, [1902] 2 Ch. 679.
Affirmed, with a variation. [1903] 2 Ch. 16

—— *London and Caledonian Marine Insurance Co., In re*, (1879) 11 Ch. D. 140.
Approved and followed by Farwell J. PULSFORD *v.* DEVENISH [1903] 2 Ch. 625

—— *Long* v. *Blackall*, (1797) 7 T. R. 100; 4 R. R. 73.
Discussed by C. A. *In re* WILMER'S TRUSTS - - [1903] 2 Ch. 411

—— *Lovell, Ex parte* - - [1901] 2 K. B. 16
Distinguished by Kekewich J. *In re* COTGRAVE - - [1903] 2 Ch. 705

—— *Lyne's Trust, In re* (1869) L. R. 8 Eq. 65
Disapproved by C. A. *In re* COLEY [1903] 2 Ch. 102

—— *Macintosh and Thomas, In re*, [1903] W. N. 95.
Reversed by C. A. - [1903] 2 Ch. 394

—— *McIver & Co.* v. *Tate Steamers, Ld.*, [1902] 2 K. B. 184.
Followed by Farwell J. *In re* ERMEN [1903] 2 Ch. 156

—— *Mackenzie* v. *Childers*, (1889) 43 Ch. D. 265.
Applied by Swinfen Eady J. ROWELL *v.* SATCHELL - [1903] 2 Ch. 212

—— *Mare, In re* - - [1902] 2 Ch. 112
Disapproved by C. A. *In re* BRYDONE'S SETTLEMENT - - [1903] 2 Ch. 84

—— *Martin* v. *Holgate*, (1866) L. R. 1 H. L. 175.
Followed by Joyce J. *In re* WOOLLEY [1903] 2 Ch. 206

—— *Merrick's Trusts, In re*, (1866) L. R. 1 Eq. 551.
Considered and explained by Joyce J. *In re* WOOLLEY - [1903] 2 Ch. 206

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—— *Mundy and Roper's Contract, In re,* [1899] 1 Ch. 275.
Followed by Farwell J. *In re* Cornwallis-West and Munro's Contract [1903] 2 Ch. 150

—— *Neeld* v. *Hendon Urban Council,* (1899) 81 L. T. 405.
Distinguished by Joyce J. Harvey *v.* Truro Rural Council [1903] 2 Ch. 638

—— *Nightingale* v. *Reynolds* - [1902] 2 Ch. 117
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—— *Noakes & Co.* v. *Rice,* [1902] A. C. 24; [1900] 2 Ch. 445, 457.
Principle of, applied by C. A. Jarrah Timber and Wood Paving Corporation, Ld. *v.* Samuel - [1903] 2 Ch. 1

—— *Orford (Countess of), In re,* [1896] 1 Ch. 257.
Explained by C. A. Berry *v.* Gaukroger - - [1903] 2 Ch. 116

—— *Palmer* v. *Young* - (1684) 1 Vern. 276
Incorrectly reported; see the full report. *In re* Biss
C. A. [1903] 2 Ch. 40, at p. 65, n.

—— *Potts* v. *Smith* - (1869) L. R. 8 Eq. 683.
Considered by Farwell J. *In re* Metcalf - - [1903] 2 Ch. 424

—— *Rawe* v. *Chichester,* (1773) Amb. 715, 719.
Considered by C. A. *In re* Biss [1903] 2 Ch. 40

—— *Remnant, In re* - (1849) 11 Beav. 603
Distinguished by Swinfen Eady J. *In re* Fletcher and Dyson [1903] 2 Ch. 688

—— *Rumball* v. *Schmidt* (1882) 8 Q. B. D. 603
Discussed by Farwell J. Mullis *v.* Hubbard - - [1903] 2 Ch. 431

—— *Scott* v. *Coulson* - - [1903] 1 Ch. 453
Affirmed by C. A. - [1903] 2 Ch. 249

—— *Serle* v. *Fardell* - (1890) 44 Ch. D. 299
Not followed by C. A. Wynne-Finch *v.* Chaytor - - [1903] 2 Ch. 475

—— *Smith's Settlement, In re,* [1903] 1 Ch. 373
Approved by C. A. *In re* Brydone's Settlement - - [1903] 2 Ch. 84

—— *Steward* v. *Poppleton* - W. N. (1877) 29
Followed by Kekewich J. *In re* O'Connell - - - [1903] 2 Ch. 574

—— *Stockdale* v. *Ascherberg,* [1903] 1 K. B. 873
Applied by Swinfen Eady J. *In re* Warriner - - [1903] 2 Ch. 367

—— *Stoddart* v. *Saville* - [1894] 1 Ch. 480
Disapproved by C. A. *In re* Brydone's Settlement - - [1903] 2 Ch. 84

—— *Townshend* v. *Harrowby,* (1858) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353.
Distinguished by Kekewich J. *In re* O'Connell - - [1903] 2 Ch. 574

—— *Tulk* v. *Moxhay* - - (1848) 2 Ph. 774
Principle of, not applied by C. A. Formby *v.* Barker - [1903] 2 Ch. 539

—— *Upton* v. *Brown* - (1879) 12 Ch. D. 872
Disapproved by C. A. *In re* Brydone's Settlement - [1903] 2 Ch. 84

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—— *Vernon's Case* - - 4 Rep. 1 a, 4 a.
Principle of, applied by C. A. *In re* Bolton Estates - [1903] 2 Ch. 461

—— *Wilmer's Trusts, In re. Moore* v. *Wingfield,* [1903] 1 Ch. 874.
Affirmed by C. A. - [1903] 2 Ch. 411

—— *Wilson* v. *Atkinson,* (1864) 4 D. J. & S. 455
Considered by C. A. *In re* Brydone's Settlement - - [1903] 2 Ch. 84

—— *Wrexham, Mold and Connah's Quay Ry. Co., In re,* [1900] 1 Ch. 261.
Distinguished by Farwell J. *In re* Lancashire, Derbyshire and East Coast Railway Acts, 1891 to 1896, and *In re* Lincoln and East Coast Railway Acts, 1897 to 1902 [1903] 2 Ch. 711

—— *Yorkshire Railway Wagon Co.* v. *Maclure,* (1882) 21 Ch. D. 309, 314.
Applied by Swinfen Eady J. *In re* Liskeard and Caradon Ry. Co. [1903] 2 Ch. 681

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CHARGING ORDER — Equitable execution — Effect of order—Unascertained residue —Priority - - - - 727
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CHARITY — Ademption — Gift to endowment fund—Particular purpose - - 326
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CHURCHWAY—Customary—Manorial custom—Evidence — Inhabitants of parish at large - - - - - 344
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CLEANSING SEWERS—Duty of local authority —Meaning of "sewer" - - 695
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CLOG—Equity of redemption—Company, Mortgage by—Irredeemable stock, Power to issue - - - - - 1
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COMPANIES WINDING-UP RULES, 1890, r. 58.
See Company. 10. 174

COMPANY—*Articles of Association—Alteration of Articles—Special Resolution—Contract—Retrospective Effect of Altered Articles—Issue of Shares—Bona fides—Voting Power—Injunction—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 50.

A company cannot contract itself out of its statutory right to alter its articles, even by an agreement independent of and outside the articles of association. The principle of *Allen* v. *Gold Reefs of West Africa,* [1900] 1 Ch. 656, applies to a case between the company and an outsider on a separate contract, as well as to a case between a company and a shareholder on the contract contained in the articles.

Where shares had been issued by the directors, not for the general benefit of the company, but for the purpose of controlling the holders of the greater number of shares by obtaining a majority of voting power:—

Held, applying the principle of *Fraser* v.

COMPANY—*continued.*

Whalley, (1864) 2 H. & M. 10, that they ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used. PUNT *v.* SYMONS & CO.
Byrne J. 506

2. —— *Creditors—Agreement for Composition—Registration—Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *ss.* 4, 5.

The Deeds of Arrangement Act, 1887, does not apply to arrangements made by limited companies.

An agreement was made between a company and some of its creditors, whose names were to be given in a schedule to the agreement, for the payment by instalments, through a trustee, of the debts due to them. A list of these creditors was given to the trustee; several of them signed the schedule, and nearly all assented to it. The agreement was not registered under the Deeds of Arrangement Act, 1887. If all the instalments had been paid the trustee would have received 936*l.*, and the debts of the creditors mentioned in the list amounted to 933*l.* 10*s.* The company paid 216*l.* to the trustee and then made default. The debenture-holders of the company claimed the whole, and the other creditors of the company claimed a share of the 216*l.* The company was not in liquidation:—

Held, that the Act of 1887 did not apply to limited companies, and the agreement was not void for want of registration; that its operation was not confined to the particular creditors who had assented to it; and that all the creditors of the company were entitled to take advantage of it. *In re* RILEYS, LIMITED. HARPER *v.* RILEYS
Byrne J. 590

3. —— *Debenture Stock — Covering Deed — Sale of Mortgaged Property—Purchase of other Property from the Company—"Charge created by the Company" — Registration — Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

Debenture stock was secured by a covering deed, executed in 1897, under which the trustees had power to sell the mortgaged premises; the proceeds of sale were also to form part of the mortgaged premises, and (at the request of the company) to be invested in other property; and all property thus assured to the trustees was to be held upon the trusts of the covering deed. Part of the mortgaged premises was sold for 2700*l.*; the company bought a leasehold house, and sub-demised it to the trustees in consideration of the 2700*l.* by a deed which referred to the covering deed, and provided that the house should be held upon the trusts of that deed:—

Held, that by the sub-lease a charge was created by the company within s. 14 of the Companies Act, 1900, and that it must be registered. CORNBROOK BREWERY COMPANY *v.* LAW DEBENTURE CORPORATION - - **Byrne J. 527**

4. —— *Debentures—Floating Security—Bank — Prior Charge precluded — Equitable Incumbrancers—Notice—Priority.*

On November 26, 1898, the managing director of a limited company, forgetting that their first mortgage debentures, though only constituting a floating security, precluded the creation of any prior charge, deposited the company's title-deeds with their bank to secure the present and future overdraft of their current account. The bank, though aware that debentures had been issued, some of which they held as security for another customer's account, made no inquiry in the matter:—

Held, that the mere possession of the debentures as security for another customer's account did not affect the bank with notice of their contents in their dealing with the company:

Held, also, that as the company's managing director by depositing the title-deeds impliedly represented that the company could give a valid first charge, the bank, though aware that debentures had been issued, were not put on inquiry, and were entitled to priority.

English and Scottish Mercantile Investment Co. v. *Brunton*, [1892] 2 Q. B. 700, and *In re Castell & Brown, Ld.*, [1898] 1 Ch. 315, followed.

On March 17, 1900, the company issued a second mortgage debenture to the bank as a collateral security for an extended overdraft. This debenture was expressed to be subject to the first mortgage debentures:—

Held, that the bank did not thereby obtain notice of the terms of the first mortgage debentures so as to postpone their equitable mortgage in respect of subsequent advances. *In re* VALLETORT SANITARY STEAM LAUNDRY COMPANY, WARD *v.* VALLETORT SANITARY STEAM LAUNDRY COMPANY - - - **Swinfen Eady J. 654**

5. —— *Directors—Appointing Directors—Disqualified Directors — Article validating Acts of de facto Directors—Summoning General Meeting—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 52, 67; *Table A*, *art.* 57.

No. 108 of the articles of a company provided that all acts done at any meeting of directors or by any person acting as a director should, notwithstanding that it should afterwards be discovered that there was some defect in the appointment of such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director. The article also provided that two directors should form a quorum; that the continuing directors might act notwithstanding any vacancy in their body; that the directors might fill up any casual vacancy; that the directors might appoint one of their body to be managing director; and (art. 89) that the office of director should (inter alia) be vacated—(*a*) if he accepted or held any other office under the company; (*b*) if he by notice in writing to the company resigned his office.

B., R., and M. were directors of the company. On October 23, 1902, B. was appointed secretary of the company, which office he resigned on December 2. At a board meeting held on December 4, and attended only by B. and R., a letter was read from M. resigning his directorship, and B. and R. then passed a resolution appointing B. managing director of the company. At the next board meeting, attended only by B. and R., a resolution was passed electing D. a director of the company. These three continued to act as directors, and on March 3, 1903, issued

COMPANY—*continued.*

notices convening the annual general meeting of the company. B., R., and D. acted in good faith, and the fact that B. had under art. 89 (*a*) vacated his directorship on October 23 and the subsequent irregularities were not brought to their attention until after March 3 :—

Held, that the irregularities in the appointment of B. and D., and the subsequent acts of B., R., and D., were validated by art. 108 and s. 67 of the Companies Act, 1862, and that they were the duly constitued board of directors.

Dawson v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6, followed. BRITISH ASBESTOS COMPANY *v.* BOYD - **Farwell J. 439**

6. —— *Mortgage—Assignment of Present and Future Book Debts—"Floating Charge"—Debenture-holders—Priority—Registration of Mortgages—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14, *sub-s.* 1 (*d*).

In October, 1902, a company, having to give security to certain guarantors, by deed assigned all its present and future book and other debts, with the benefit of all securities for the same, to a trustee, subject to redemption, in trust for the guarantors. The deed contained no express provision against possession being taken by the trustee, but contained a declaration that the trustee should at any time, if required by the guarantors, give notice of this assignment to the debtors of the company, with a proviso that it should not be incumbent on the trustee to give notice; there were also provisions that the trustee might at any time give notice, appoint a receiver, and exercise the statutory power of sale, but meantime he was not to be answerable for allowing the company to receive the book debts. A receiver having been subsequently appointed in a debenture-holder's action, the trustee now applied by motion in that action to enforce his security :—

Held (affirming the decision of Farwell J.), on the construction of the deed of October, 1902, that it was not intended by this assignment to stop the company, but that it was intended to allow it to go on receiving the book debts for the purpose of carrying on its business, and accordingly that the deed contained the true elements of a floating charge, and was therefore void for want of registration under s. 14, sub-s. 1, of the Companies Act, 1900, and had no validity against the receiver appointed in the debenture-holder's action.

Per Romer L.J.: A mortgage or charge by a company which contains the three following characteristics is a "floating charge" within the meaning of s. 14, sub-s. 1 (*d*): (1.) If it is a charge on a class of assets both present and future. (2.) If that class is one which in the ordinary course of the business of the company would be changing from time to time. (3.) If it is contemplated by the charge that, until some future step is taken by or on behalf of the mortgagee, the company may carry on its business in the ordinary way so far as concerns the particular class of assets charged. *In re* YORKSHIRE WOOLCOMBERS ASSOCIATION, LIMITED. HOULDSWORTH *v.* YORKSHIRE WOOLCOMBERS ASSOCIATION, LIMITED - - - - - **C. A. 284**

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7. —— *Winding-up—Contributory—Sale of Business to Company—Contract—"Sham" or "Illusory" Contract—Fully paid Shares—Gift of Shares—Allotment to Vendor's Nominees—Consideration, Want of—Private Company—Directors—Misfeasance—Ultra Vires.*

Two brothers, who carried on the business of working a steam-boiler patent in partnership, arranged with six shipowners to form a private company to take over the business and patent rights in consideration of 6000*l.* payable half in cash and half in shares, the capital of the company to be 25,000*l.* in 2500 shares of 10*l.* each, which were to be distributed as follows: The six shipowners were each to take fifty shares and pay for them in cash for the purpose of raising the 3000*l.* payable in cash to the vendors, and the vendors were to take 300 fully paid shares as the balance of their purchase-money. Of the remaining 1900 shares, each of the six shipowners was to take 300 fully paid shares for his own benefit, and 100 fully paid shares were to be placed in the joint names of three of them, who eventually, on the formation of the company, became directors, to be applied in rewarding persons who should bring business to the company. The company was incorporated, and the only shareholders were the vendors and the six shipowners. In order to give effect to the above arrangement, an agreement was entered into between the vendors and the company whereby the vendors purported to sell their business and patent rights to the company for 25,000*l.*, as to 3000*l.* in cash and as to 22,000*l.* by the allotment to the vendors or their nominees of 2200 fully paid shares, and this agreement was duly registered. Of these 2200 shares, 300 were allotted to the vendors, and, on the nomination of the vendors, the remaining 1900 were allotted, as to 100 to the three directors jointly for the purpose above mentioned, and as to 1800 to the three directors and the other three shipowners in equal shares for their own benefit, the whole of the 2200 shares being so allotted as fully paid.

Upon a summons by the liquidator in the winding-up of the company against the three directors to render them liable as contributories for payment of the full amount of all the shares allotted to them :—

Held, reversing Kekewich J., [1903] 1 Ch. 674, that the case was covered by *Carling's Case*, (1875) 1 Ch. D. 115, and therefore that the directors could not be placed upon the list of contributories as holders of unpaid shares. *In re* INNES & CO., LIMITED - - - **C. A. 254**

8. —— *Winding-up—Liquidator—Liability—Voluntary Winding-up—Dissolution—Unpaid Creditor—Statutory Duty of Liquidator to pay Debts—Negligence—Liquidator liable in Damages—Advertisement for Creditors—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 107, 133, 138, 143—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 25.

It is the duty of the liquidator to find out from the books and papers of the company and the statement of affairs who are the creditors of the company, and if any creditor omits to put in his claim the liquidator should communicate with him.

COMPANY—*continued.*

Sect. 133 of the Companies Act, 1862, imposes a statutory duty on the liquidator to pay the debts of the company pari passu, and, subject thereto, to distribute the property of the company amongst the shareholders; and whilst the liquidation continues a contributory can apply under s. 138 of the Act, and a creditor can apply under s. 25 of the Act of 1900, to the Court for relief in respect of his rights. When the company is dissolved the statutory remedy is gone, but the duty remains, and a contributory or creditor has a remedy at common law for injury caused to him by a breach of the liquidator's statutory duty.

A company went into voluntary liquidation and appointed a liquidator, and its business and assets were transferred as a going concern to a purchasing company in consideration of fully paid-up shares in the purchasing company, who covenanted to pay all the debts and liabilities of the liquidating company. The liquidator received the purchase consideration of fully paid-up shares and distributed them amongst the shareholders of the liquidating company. The assets of the liquidating company were sufficient to pay all its debts in full, but the liquidator, beyond advertising insufficiently for creditors, took no steps to ascertain the creditors of the liquidating company or to see that they were paid. He left everything to the purchasing company. After the dissolution of the liquidating company:—

Held, that the liquidator had been guilty of negligence in the discharge of his statutory duty, and was liable in damages to unpaid creditors of the liquidating company of whose claims he was aware and who had no notice of the liquidation until long after the dissolution of the company.

Dictum of James L.J. in *In re London and Caledonian Marine Insurance Co.*, (1879) 11 Ch. D. 140, approved and followed.

Knowles v. *Scott*, [1891] 1 Ch. 717, discussed and distinguished. PULSFORD *v.* DEVENISH
Farwell J. 625

9. —— *Winding-up Petition—Practice—Costs—Appeal—Costs of Contributories and Creditors supporting Successful Party.*

Where an appeal is brought against the decision of the Court of first instance upon a winding-up petition, and by the order of the Court below those contributories or creditors who have supported the successful party have been allowed one set of costs between them in accordance with the settled practice, if the appellant does not seek to disturb that part of the order, his proper course is not to serve such contributories or creditors with notice of the appeal, but to inform them by letter of the pendency of the appeal and of his intention not to ask for a reversal or modification of the order of the Court below so far as it deals with their costs, and then, if they think fit to appear upon the appeal and the appeal is dismissed, the rule awarding them one set of costs between them will continue to apply upon the appeal. If, on the other hand, the appellant desires to appeal against the whole order and serves such contributories or creditors with notice of appeal, they will be entitled, in the event of the appeal being dismissed, to their

COMPANY—*continued.*

separate costs of appeal. *In re* IBO INVESTMENT COMPANY - - - - **C. A. 373**

10. —— *Winding-up—Practice—Stay of Proceedings—Private Company—Undisclosed Agreement for Promoter participating in Vendor's Shares—Transfer of Vendor's Shares to Directors—Issuing Shares at a Discount—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 89—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 7—*Companies Winding-up Rules*, 1890, *r.* 58.

In the exercise of its jurisdiction with reference to staying proceedings under an order for the winding-up of a company, the Court should, so far as possible, act upon the principles which are applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual—in which cases the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large.

In refusing or postponing a stay of winding-up proceedings the Court will have regard to the following facts:—

(*a*) That directors have not complied with their statutory duties as to giving information to the official receiver or furnishing a statement as to the affairs of the company.

(*b*) That there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully paid shares forming the consideration for the purchase of property by the company on its formation.

(*c*) That the promoter has made gifts of fully paid shares to the directors.

(*d*) That there are any other matters connected with the promotion, formation, or failure of the company, or the conduct of its business or affairs, which appear to the Court to require investigation.

And, *semble*, the same principles are applicable whether the company has or has not invited the public to subscribe for its shares—at any rate, if any shares held by those originally connected with a company of the latter description have been transferred to persons not having full knowledge of what has been previously done. *In re* TELESCRIPTOR SYNDICATE, LIMITED
Buckley J. 174

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COUNSEL—Fees—Taxation—Judgment, Attending to hear - - - - 40
See LANDLORD AND TENANT. 4.

COVENANT—*Building Restrictions—One House—Double-tenement House.*

A building structurally divided into two tenements on different floors, with no internal communication, common staircase, or common front door, constitutes two houses within the meaning of a covenant not to erect more than one house on the site.

Grant v. *Langston*, [1900] A. C. 383, 399, followed.

Kimber v. *Admans*, [1900] 1 Ch. 412, distinguished. ILFORD PARK ESTATES, LIMITED *v.* JACOBS - - - Swinfen Eady J. 522

2. —— *Restrictive Covenant—Covenant running with Land—Covenant enforceable in Equity—Personal and Collateral Covenant—Sale of all Covenantee's Land—Breach after Death of Covenantee—Right of Action by Personal Representative against Assign or Covenantor.*

When on the sale of the whole of a vendor's land the purchaser enters into a covenant restricting the user of the land, the executor of the vendor cannot maintain an action for an injunction against an assign of the purchaser in respect of a breach of the covenant committed after the vendor's death.

Such a covenant is merely personal and collateral, and the principle of *Tulk* v. *Moxhay*, (1848) 2 Ph. 774, does not apply to it. FORMBY *v.* BARKER - - - - C. A. 539

COVENANT—*continued.*

3. —— *Restrictive Covenant—Object of Covenant—Building Scheme—Implied Covenants with other Purchasers—Alteration of Character of Neighbourhood—Acquiescence in Breaches—Injunction.*

Alteration in the character of a neighbourhood is no defence to an action on a covenant restricting user unless it is proved, by the existence of a building scheme or otherwise, that the covenant was entered into with the object either of securing the common advantage of a number of purchasers, or of protecting other property of the covenantee, and that the covenantee has, by his own acts or acquiescence, made it impossible to attain that object.

The Court will not imply mutual covenants between a number of purchasers unless the persons and the plots of land which are to be bound are in some way defined.

O. sold a plot of land to B., and took from B. a covenant, among others, that houses erected thereon should be used as private residences only. The covenants were contained in a printed form of agreement which O. used in the sale of many plots; it contained a power for the vendor to waive or vary the covenants with regard to unsold lots. There had been no sale or attempted sale by auction. No plan was produced to B. shewing what plots were affected by the restrictions. O. afterwards himself built, or allowed to be built, a number of shops on the adjoining plots, and acquiesced in some slight breaches of covenant in respect of B.'s land. The defendant, who purchased from B. and had notice of the covenant, began to alter two houses erected on the plot into shops. O. brought an action to restrain him:—

Held, that no building scheme had been proved to exist, and, in the absence of such a scheme and of proof that the covenant was entered into merely for the protection of O.'s property, the change in the character of the neighbourhood, though caused by his own acts, did not, nor did his acquiescence in minor breaches, disentitle him to an injunction. OSBORNE *v.* BRADLEY - - Farwell J. 446

—— After-acquired property, Covenant to settle—Power or property - - 574
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—— Assignment—Covenant by lessee not to assign without licence "not to be unreasonably withheld"—Unreasonable condition - - - - 112
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—— "Impositions"—Three years' tenancy—Drains - - - - 367
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CRIMINAL LAW—Convict's property, Sale of—Administrator—Bona fides—Discretion - - - - - 279
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CROWN—*Jura Regalia—Treasure Trove—Celtic Gold Ornaments—Alleged præ-Christian Votive Offerings—Royal Charter—Grant of Lands to Subjects—Construction—General Words—"Franchises"—Title of Crown—Jus Tertii.*

Where gold or silver articles whose owner is unknown are found buried and lying all together in one place, the presumption is that they were intentionally hidden for the benefit of the depositor, and they are therefore treasure trove.

Treasure trove, being one of the jura regalia which belong to the King by virtue of his prerogative, cannot be claimed under a general grant of franchises in a royal charter, but must itself be expressly granted; although, when so granted, it becomes a franchise in the grantee.

The rule of construction applicable to grants from the Crown to a subject discussed.

Quære, whether in all claims to property, either real or personal, by the Crown, the defendant can defeat the claim of the Crown only by shewing a better title in himself, or whether he can do so by shewing a better title in some one else. ATTORNEY-GENERAL *v.* TRUSTEES OF BRITISH MUSEUM - - Farwell J. 598

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EXECUTOR — *Investment—Administration—Contingent Legacy without Interest—Appropriation of Investment.*

When a cash legacy is given upon the happening of a contingency, e.g., the attainment of twenty-one by the legatee, but without interest in the meantime, the executor is not entitled to set apart and invest the amount and appropriate the investment to satisfy the legacy, so that in case, on the happening of the contingency, the investment has become depreciated in value, the legatee must bear the loss.

An investment made under such circumstances remains part of the testator's estate, and the legatee is entitled on the happening of the contingency to receive the amount of the legacy in full in cash.

But if an executor sets aside and properly invests a reasonable amount to secure the legacy, he may then distribute the residue of the estate, and he will not be held personally responsible if, when the legacy becomes payable, the investment turns out to be not sufficient to answer it.

Decision of Kekewich J., W. N. (1902) 208, reversed. *In re* HALL. FOSTER *v.* METCALFE C. A. 226

—— Notice to—Equitable execution—Effect of order — Unascertained residue—Charging order—Priority - - 727
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EXHIBITS—Service of—Motion for attachment —Affidavit in support - - 312
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FELONY — *Convict's Property—Administrator—Sale of—Bona Fides—Discretion—Action by Convict against his Administrator—Forfeiture Act,* 1870 (33 & 34 *Vict. c.* 23), *ss.* 12, 17, 18.

Sect. 12 of the Forfeiture Act, 1870, which gives the administrator of a convict's property "absolute power to sell" any part of that property "as to him shall seem fit," imports that the administrator must exercise discretion and care in case of a sale; and if he does so, then, under s. 17, any contract falling within s. 12 is binding and cannot be in any way impeached by the convict on his discharge.

But if an administrator under the Act is proved to have exercised no discretion or care in the matter of a sale, and a loss thereby ensues to the convict's estate, the Court will hold the administrator personally responsible for the loss.

Decision of Buckley J., [1903] 1 Ch. 90, affirmed. CARR *v.* ANDERSON - C. A. 279

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FRIENDLY SOCIETY—Mortgage to—Sale under power—Sale by auction—Purchase by officer of society—Invalidity - 647
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GAS — *Testing — Interpretation of Statutes — "Daily"—Metropolis—Gaslight and Coke and other Gas Companies Acts Amendment Act*, 1880 (43 & 44 *Vict. c. clxxxi.*), *s.* 7.

By the South Metropolitan Gas Company's special Acts of 1869 and 1876, provision was made for the public testing of the quality of the gas supplied by them to their customers. The mode of testing and the situation and the number of the testing places, which were to be provided by the company and to be under the control of the Metropolitan Board of Works, were to be prescribed by gas referees appointed by the Board of Trade, and daily testings were to be made by gas examiners appointed by the Metropolitan Board. Similar provisions were contained in the special Acts of the other metropolitan gas companies. By an Act passed in 1880, which was applicable to all the metropolitan gas companies, the provisions as to daily testings were substantially re-enacted by a section which provided that a gas examiner should at each testing place make daily such number of testings as the gas referees should prescribe.

There was also a provision in the special Act of 1869, which was to be read with the Act of 1880, defining "day" as twenty-four hours, beginning at 9 o'clock in the forenoon of one day and ending at 9 o'clock in the forenoon of the next. The practice under these Acts until 1902 had been to test on week-days only:—

Held, that the literal meaning of "daily" in the Act of 1880, read with the Act of 1869, with reference to the South Metropolitan Gas Company was "every day," including Sundays, taking the day as commencing at 9 o'clock in the forenoon, and that the practice prevailing under similar provisions in previous Acts of Parliament from 1869 to 1880 was not sufficient to justify the Court in construing the Act of 1880 with reference to that practice, in accordance with the principle suggested by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, 591:

Held, therefore, that the gas examiners appointed by the London County Council as the

GAS—*continued.*
successors of the Metropolitan Board were entitled to test on Sundays the Gas supplied by the company. LONDON COUNTY COUNCIL *v.* SOUTH METROPOLITAN GAS COMPANY **Joyce J. 532**

GASLIGHT AND COKE COMPANY—Gas—Testing—"Daily" - - - 532
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—— To trustee—Refusal to act—Disclaimer by grantee—Revesting of legal estate
See VOLUNTARY SETTLEMENT. 494

HIGHWAY — *Roadside Strip — Land between Fences separating Highway from Adjoining Land —Presumption of Dedication.*

In the case of an ordinary highway running between fences, although the space between them may be of a varying and unequal width, the right of passage or way primâ facie, and unless there be evidence to the contrary, extends to the whole of the ground between the fences, and the public are not confined to the metalled portion. All the space between the fences is presumably dedicated as highway unless the nature of the ground or other circumstances rebut that presumption, and the owner of the adjoining lands is not entitled to inclose any portion of it.

Mere disuse of a highway for any length of time cannot deprive the public of their rights in respect of it. The mere consent of a highway authority to an obstruction or encroachment upon the highway is ineffectual for the purpose of legalising that obstruction or encroachment.

Neeld v. *Hendon Urban Council*, (1899) 81 L. T. 405, distinguished. HARVEY *v.* TRURO RURAL DISTRICT COUNCIL - - **Joyce J. 638**

HOSPITAL — Ademption — Charitable legacy—Gift to endowment fund - - 326
See WILL. 2.

HOTCHPOT—Annuities immediate and reversionary — Deficient estate—Abatement—Apportionment - - - 424
See ANNUITY.

HUSBAND AND WIFE—*Assignment, Equitable —Priority—Trust Fund—Fund in Court—Notice —Stop Order—Morocco.*

Upon the marriage in Morocco in 1865 of a Jewish husband and wife (the husband being domiciled in that country), a document called a "ketubah" was executed, under which it was alleged that the children of the marriage took an interest in the property of the wife. By the will of an English testator, who died in 1858,

HUSBAND AND WIFE—*continued.*

a sum of 10,000*l.* Consols was bequeathed to trustees, upon trust for the wife's mother for her life, with remainders to her children in equal shares. At the time of the marriage the wife was, subject to her mother's life estate, entitled to one-fourth of the fund. The fund was in court in a suit to administer the testator's estate, and stood to the separate account of the mother and her family. In 1878 the wife died intestate, and the husband took out administration in England to her estate. He in 1885, as her administrator, assigned her share of the fund for value to a reversionary society, and they obtained a stop order upon that share of the fund. The society had no notice of the "ketubah," and no notice had been given to the trustees of the will, and no stop order had been obtained on behalf of the persons entitled under it. In 1898 the tenant for life died.

Upon a petition in the suit by the society for payment of one-fourth of the fund to them:—

Held, that, the husband having the legal title to dispose of his wife's interest in the fund, the society had by means of the stop order obtained priority, and that the wife's share of the fund must be paid out to them.

In re Freshfield's Trust, (1879) 11 Ch. D. 198, approved and followed.

Decision of Byrne J. reversed upon a ground not taken before him. MONTEFIORE *v.* GUEDALLA C. A. 26

2. —— *Purchase in name of Husband—Payment out of Wife's Property—Resulting Trust—Presumption—Evidence—Capital or Income.*

In 1883 the defendant married Colonel Mercier. They kept a joint banking account almost entirely composed of the wife's income, and both husband and wife drew on this account. In 1891 they bought some land, which was paid for out of the joint account and was conveyed to the husband. He died intestate in 1901, and his heir-at-law claimed the land:—

Held (affirming the decision of Buckley J.), that Mrs. Mercier had not made a gift of the purchase-money to her husband, and that the land belonged to her.

Per Romer and Cozens-Hardy L.JJ.: There is no distinction in principle between the presumption of a resulting trust in favour of the wife which arises when her income has been applied to a purchase in her husband's name and that which arises when the payment has been made out of her capital.

Alexander v. *Barnhill*, (1888) 21 L. R. Ir. 511, explained. MERCIER *v.* MERCIER - C. A. 98

—— Insurance, Life—Covenant for payment to trustees—Satisfaction—Settlement 303
See INSURANCE, LIFE. 2.

—— "Wife" of a person, gift to for life—Second wife, whether included—Persona designata - - - - - 102
See WILL. 7.

"IMPOSITIONS"—Covenant — Three years' tenancy—Drains - - - 367
See LANDLORD AND TENANT. 2.

INFANT—Will—Repugnancy—Absolute gift—Gift over on death "without a will and childless" - - - - 458
See WILL. 1.

INJUNCTION—Building scheme—Alteration of character of neighbourhood—Acquiescence in breaches - - - 446
See COVENANT. 3.

—— Company—Articles of association, Alteration of—Voting power - - 506
See COMPANY. 1.

—— Damages or injunction—Ancient lights—Future injury—Extortion - 337
See LIGHT. 1.

—— Waste, Equitable — Ornamental timber—Evidence - - - - 664
See WASTE.

INSURANCE—Contract whether of insurance or suretyship - - - - 670
See PRINCIPAL AND SURETY.

INSURANCE, LIFE—*Sale of Life Policy—Mistake—Death of Assured before Contract—Subsequent Knowledge by one Party — Assignment — Rescission after Completion — Contract—Vendor and Purchaser.*

A contract for the sale of a life policy was entered into by both parties in the belief that the assured was alive, and the contract was completed by assignment. Between the dates of the contract and the assignment the purchaser received information which led him to believe that at the date of the contract the assured was dead, which after the date of the assignment was ascertained to have been the fact, but the purchaser never disclosed his information to the vendor:—

Held, affirming Kekewich J., [1903] 1 Ch. 453, that the vendor was entitled to have the transaction set aside notwithstanding that it had been completed by assignment. SCOTT *v.* COULSON - - - - - C. A. 249

2. —— *Settlement—Covenant for Payment to Trustees—Policies subsequently effected by Settlor for Benefit of Wife and Children—Satisfaction.*

By a marriage settlement in 1864 the settlor covenanted with the trustees for the payment to them in his lifetime, or within six months after his decease, of a sum of 2000*l.*, to be held in trust for the wife for life, and after her death for the settlor for life, and after the decease of the survivor for the children of the marriage and of a former marriage as the husband and wife should jointly appoint, and in default of appointment for the children of both marriages, sons at twenty-one and daughters at twenty-one or marriage. In January, 1873, the settlor effected two policies on his own life, each for 1000*l.*, under the provisions of s. 10 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), each policy being expressed to be "for the benefit of his wife and children." At his death in 1902 the covenant remained unperformed:—

Held, that, having regard to the difference between the provisions under the settlement and under the policies, it was impossible to hold that the settlor, when he effected the policies, intended that the policy moneys should be taken in substitution for the benefits under the settlement, and

INSURANCE, LIFE—*continued.*
that therefore the provision which the settlor made by the policies was not by way of satisfaction of the covenant. CARTWRIGHT *v.* CARTWRIGHT - - - Kekewich J. 306

INTEREST—Contingent legacy without—Appropriation of investment - - 226
See EXECUTOR.

—— Lease—Renewal—Fine - 65, n.
See LANDLORD AND TENANT. 5.

—— Unpaid duty—Estate duty—Instalments, Duty payable by—Charge on inheritance - - - - - 69
See SETTLED LAND. 2.

INTERPRETATION—Statutes.
See under STATUTE.

INVESTMENT — Appropriation — Contingent legacy without interest - - 226
See EXECUTOR.

—— Appropriation of payments—Breach of trust —Banking account—Mixed fund 356
See TRUSTEE. 2.

ISSUE—Original or substitutional gift—Construction of will - - - 206
See WILL. 4.

JOINDER—Attorney-General—Local authority —Extent of powers - - 556
See BURIAL.

JOINT TENANCY—Tenancy in common or—Construction of will - - - 206
See WILL. 4.

JOINTURE—Execution of power of jointuring by testamentary instrument - - 461
See STATUTE.

JUDGMENT CREDITORS—Equitable execution —Effect of order—Notice to executor—Priority - - - - 727
See RECEIVER.

JUDICATURE ACT — Appealing, Mode of — Judgment entered in pursuance of direction of referee - - 475
See PRACTICE. 2.

JURA REGALIA—Treasure trove—"Franchises" —Title of Crown—Jus tertii - 598
See CROWN.

JURISDICTION—Injunction or damages—Ancient lights—Future injury—Extortion
See LIGHT. 337

—— Taxing master—Costs—Common order—Extension of time - - - 394
See PRACTICE. 4.

JUS TERTII—Treasure trove—"Franchises"—Title of Crown - - - 598
See CROWN.

LAND TRANSFER—Copyholds—Equitable interest—Devolution—Person to convey
See VENDOR AND PURCHASER. 1. 583

LANDLORD AND TENANT — *Lease — Assign without Licence "not to be unreasonably withheld," Covenant by Lessee not to—Licence—Unreasonable Condition—Assignment without Licence—Practice*

LANDLORD AND TENANT—*continued.*
—Jurisdiction—Declaratory Order—Lessor and Lessee — Rules of Supreme Court, 1883, *Order XXV., r.* 5.

Where a lease contains a covenant by the lessee not to assign without the licence in writing of the lessor, "such licence not to be unreasonably withheld," although the lessor, in refusing a licence to assign, is not bound to give any reason for his refusal, yet if, in granting a licence he attaches to it a condition which, in the opinion of the Court, is unreasonable, the Court will, in an action brought by the lessee for the purpose, make a declaratory order under the Rules of the Supreme Court, 1883, Order XXV., r. 5, declaring that the lessor is not entitled to impose the unreasonable condition, and that the lessee is entitled to assign without any further consent of the lessor. YOUNG *v.* ASHLEY GARDENS PROPERTIES, LIMITED - - - - C. A. 112

2. —— *Lease—Covenant — "Impositions" — Covenant by Tenant to pay—Three Years' Tenancy —Notice by Sanitary Authority to reconstruct Drains.*

A landlord let a house to a tenant for three years at the "clear yearly rent" of 54*l.*, to be paid "free and clear of and from all deductions whatsoever," property tax excepted.

The tenant covenanted to pay the rent and to pay and discharge "all rates, taxes, assessments, and impositions whatsoever, whether parliamentary, parochial, or otherwise," that might become due or assessed in respect of the premises during the tenancy, property tax excepted, and to keep the premises in as good repair as at the commencement of the tenancy, fair wear and tear excepted.

The landlord covenanted to keep the main walls and roof in repair during the tenancy:—

Held, that the duty and expense of complying with a notice from the sanitary authority to reconstruct the drains constituted an "imposition" within the agreement which fell on the tenant notwithstanding the absence of such words as "imposed on the landlord or tenant," and notwithstanding the shortness of the tenancy.

Foulger v. *Arding*, [1902] 1 K. B. 700, 710, and *Stockdale* v. *Ascherberg*, [1903] 1 K. B. 873, considered and applied. *In re* WARRINER. BRAYSHAW *v.* NINNIS - Swinfen Eady J. 367

3. —— *Lease—Fixtures — Trade Fixtures — Tenant's Right of Removal—Lease—Covenant to yield up at end of Term—Construction—General Words—Ejusdem Generis.*

A lease to a tenant, who was therein described as a boot and shoe manufacturer, contained a covenant by the tenant to yield up the demised premises on the determination of the term, together with all doors, locks, keys, &c., wainscots, hearths, stoves, marble and other chimney-pieces, &c., "and all other erections, buildings, improvements, fixtures, and things which are now or which at any time during the said term hereby granted shall be fixed, fastened, or belong to" the demised premises. The word "machinery" did not occur in this covenant. There was also a covenant by the tenant that he would not carry on in the demised premises any trade or business, except that of a boot and shoe manufacturer,

LANDLORD AND TENANT—*continued.*
without the licence of the lessor, and that the tenant would not erect on the premises any machinery other than that propelled by hand or foot without the consent of the lessor.

The tenant placed in the premises for the purposes of his business various machines, which for their more convenient user were fastened by screws or nails to the floor or to the walls of the premises.

The tenant having become a bankrupt, the trustee in the bankruptcy desired to sell the machinery separately from the premises:—

Held, that the general words in the above covenant must be construed as applying only to things ejusdem generis with those described in the previous particular enumeration, which were of the nature of "landlord's fixtures," and that the tenant was not deprived of his ordinary right to remove trade fixtures, such as the machinery in question, and that consequently the trustee was entitled to sell the machinery.

Decision of Kekewich J., [1903] 1 Ch. 806, reversed.

When in such a covenant the things particularly enumerated belong to one genus—such as landlord's fixtures—general words which follow must be construed as applying only to things of the same genus.

Bishop v. *Elliott*, (1855) 11 Ex. 113, followed.
LAMBOURN *v.* MCLELLAN - - **C. A. 268**

4. —— *Lease—Renewal—Death of Lessee—Intestacy — Next of Kin—Infant — Tenants in Common—New Lease—Renewal by one Tenant in Common—Partial Interest in old Lease—Accretion to Intestate's Estate—Renewal for Benefit of Estate—Fiduciary Relation — Trustee—Constructive Trust—Practice—Costs—Taxation—Counsel's Fees — Judgment, Attending to hear — Practice Notes on Taxation*, 1902.

There is no authority for the general proposition that if a person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease. A person renewing is only held to be a constructive trustee of the new lease if, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested: as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a partnership lease, or by a mortgagee of a mortgaged lease. In all such cases the new lease is treated as engrafted on or as forming part of the original lease.

A lessor granted a lease for seven years of a house in which the lessee carried on a profitable business. On the expiration of the term the lessor refused to renew, but allowed the lessee to remain as tenant from year to year at an increased rent. During that tenancy the lessee died intestate, leaving a widow and three children, one being an infant. The widow took out administration to her husband's estate, and she and the two adult children, one of whom was a son, continued to carry on the business under the existing yearly tenancy. The widow and son each applied to the lessor for a new lease for the benefit of the estate, which he refused to grant, but, having determined the yearly tenancy by notice, he granted to the son "personally" a new lease for three years at a still further increased rent.

In an action which had in the meantime been instituted by the three children, including the infant, against the administratrix for administration of the intestate's estate, the administratrix applied to have the new lease treated as having been taken by the son for the benefit of the estate, and for an account of the rents and profits received by him:—

Held, by Buckley J., on the authority of *Ex parte Grace*, (1799) 1 Bos. & P. 376, that the son was a trustee of the new lease for the benefit of the estate, and an account was directed accordingly:

But *held*, by the Court of Appeal, that the evidence took the case out of *Ex parte Grace* in that it shewed that the right or hope of renewal had been determined by the lessor himself before the son intervened, so that the new lease could not be treated as an accretion to the estate of the deceased, and also that the son had in no way abused his position nor stood in any fiduciary relation towards nor owed any duty to the other persons interested in the estate; and that he was therefore entitled to retain the lease for his own benefit.

Dictum of Lord Bathurst L.C. in *Rawe* v. *Chichester*, (1773) Amb. 715, 719, considered.

Ex parte Grace distinguished.

Palmer v. *Young* (1684), incorrectly reported in 1 Vern. 276, considered: see the full report, [1903] 2 Ch. 65 (note).

A separate fee to counsel for attending to hear judgment will not be allowed when judgment is given in the same sittings in which the case was heard: see Practice Notes on Taxation of Costs, issued from the Taxing Office, 1902. *In re* BISS.
BISS *v.* BISS - - - - **C. A. 40**

5. —— *Lease—Renewal—Fine—Interest.*

Palmer v. *Young* (1684), incorrectly reported in 1 Vern. 276, considered: see the full report, under *In re* BISS **C. A. [1903] 2 Ch. 40, at p. 65, n.**

—— Costs of lease—Taxation—Concurring parties—Separate solicitors—Collective bill
See SOLICITOR. 2. **688**

LEASE.
See under LANDLORD AND TENANT.

LEGACY.
See under WILL.

LEGITIMACY—*Perpetuating Testimony — Right of Action—Evidence—Order for Examination—Discretion of Court—Legitimacy Declaration Act*, 1858 (21 & 22 *Vict. c.* 93), *s.* 1—*Rules of Supreme Court*, 1883, *Order* XXXVII., *r.* 35.

An action was brought to perpetuate testimony concerning the validity of the marriage of the plaintiff's mother with a view to establish his claim to succeed, on the death of his father, to a peerage and to the family estates, to which the plaintiff claimed to be entitled as next tenant in tail male in remainder expectant on the death of his father:—

Held, by the Court of Appeal, that, inasmuch

LEGITIMACY—*continued.*
as the sole question really in dispute was the validity of the marriage of the plaintiff's mother, and he could, by proceeding under the Legitimacy Declaration Act, 1858, obtain an immediate judicial determination of that question, an order for the examination of witnesses abroad, for the purpose of perpetuating their testimony, ought not to be made.

Under rule 35 of Order XXXVII. the Court has a discretion as to making such an order, and is entitled to consider all the circumstances of the case.

Decision of Kekewich J., (1903) W. N. 94, reversed.

Per Stirling L.J.: *Semble*, that the plaintiff could at once, by virtue of the Rules of the Supreme Court, 1883, Order XXV., r. 5, bring an action for a declaration of his title to the estates as tenant in tail in remainder expectant on the death of his father. WEST *v.* LORD SACKVILLE C. A. 378

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIGHT—*Ancient Lights—Injunction or Damages—Future Injury—Oppression—Extortion—Jurisdiction—Lord Cairns' Act* (21 & 22 *Vict. c.* 27), *s.* 2.

The plaintiffs brought an action for an injunction to restrain the defendant from erecting a building so as to darken their ancient lights. The defendant alleged that the plaintiffs had bought their house merely with a view to extorting money from any person who tried to build on the defendant's land; that the action was therefore oppressive; that the injury (if any) would be trifling; and that it was a case for damages, and not for an injunction:—

Held, that the plaintiffs' windows were ancient lights, and would be materially interfered with by the defendant's proposed buildings; that it was not extortion or oppression on the part of the owner of an easement to ask a price which the property for exceptional reasons in fact commanded; and that an injunction ought to be granted.

The principles upon which the Court will give damages instead of an injunction discussed. COWPER *v.* LAIDLER - - Buckley J. 337

—— Disused burial ground—Adjacent landowner—Right to access of light - 556
See BURIAL.

LIMITATION—Validity of—Excessive appointment—Remoteness - - - 486
See POWER OF APPOINTMENT.

LIQUIDATOR—Statutory duty of liquidator to pay debts—Negligence—Liability 625
See COMPANY. 8.

LOCAL GOVERNMENT — *Union — Parish — Transfer of Land from one Parish to another—Alteration of Boundaries of Union—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 58.

Land forming part of parish D. in the poor law union of Bootle was, by order of the county council confirmed by the Local Government Board, transferred to parish S. in the union of Whitehaven, and parish S. was transferred from the

LOCAL GOVERNMENT—*continued.*
rural district of Whitehaven to the rural district of Bootle. The order did not purport to affect the boundaries of the unions:—

Held, that the whole of parish S., as enlarged by the order, was comprised within the union of Whitehaven. BOOTLE GUARDIANS *v.* WHITEHAVEN GUARDIANS - - - Byrne J. 142

—— Building line—Approval of plans—"Written consent" of urban authority - 431
See STREETS.

—— "Sewer," Meaning of—Duty of local authority—Cleansing sewers - - 695
See SEWERS.

LONDON — Disused burial ground — Adjacent landowner—Right to access of light 556
See BURIAL.

—— Gas—Testing—"Daily" - - 532
See GAS.

MANOR—Customary churchway—Manorial custom—Evidence—Inhabitants of parish at large - - - - 344
See WAY, RIGHT OF. 1.

MANSION-HOUSE—Trust to keep up, and permit A. to reside—"Tenant for life"—"Possession" - - - 16
See SETTLED LAND. 3.

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MARSHALLING—For payment of mortgage—Priority of cestui que trust - 494
See VOLUNTARY SETTLEMENT.

METROPOLIS.
See under LONDON.

MISTAKE — Life policy, Sale of — Death of assured before contract - - 249
See INSURANCE, LIFE. 1.

MORTGAGE — *Foreclosure—Account—Allowances—Cost of Repairs—Mortgagee out of Possession—Receiver—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 24, *sub-s.* 8 (*iii.*).

First mortgagees of leasehold premises, acting under the powers of the Conveyancing and Law of Property Act, 1881, appointed as receiver the manager of a guarantee society which had guaranteed them against loss on their mortgage. The mortgagors were under covenant with their lessor to keep the premises in repair, and were under covenant with the first mortgagees to observe the covenants of the lease. The premises being out of repair, the receiver put them into repair and paid the cost out of moneys found by the society. These repairs were not authorized in writing by the first mortgagees, and the cost of them was in excess of the rents and profits in the hands of the receiver. In an action for foreclosure by the first mortgagees against the second mortgagee and the mortgagors:—

Held, that, in taking the account of what was due to the first mortgagees under their security, the cost of these repairs (assuming them to be necessary and proper) ought not to be allowed, whether such cost was to be treated as a payment

MORTGAGE—*continued.*

by the receiver or by the first mortgagees themselves.

The position of a receiver under the Conveyancing and law of Property Act, 1881, discussed, WHITE *v.* METCALF - **Kekewich J. 567**

2. —— *Friendly Society, Mortgage to—Sale under Power — Sale by Auction — Purchase by Officer of Society — Invalidity — Mortgagor and Mortgagee.*

In 1899 the plaintiff mortgaged certain property to the trustees of a friendly society to secure an advance. In 1902 they, in exercise of their power of sale, which had arisen, put up the property for sale by auction, such sale being directed and entirely managed by a committee of the society, whose duty it was to realize mortgage securities. Previous to the sale D., a member of the committee, had on his own account inspected the property. He knew the reserve, if he had not himself fixed it, and he took part in instructing the auctioneer, who was nominated by him. He attended the auction, and bought the property for himself, the plaintiff, who had only accidentally heard of the sale three days before it took place, being present and bidding against him. The sale was at a small undervalue. In an action against the trustees of the society and D. :—

Held, that the sale was invalid, and the plaintiff was still entitled to redeem the mortgage. HODSON *v.* DEANS - - **Joyce J. 647**

3. —— *Priority—Portion—Mortgage by Direction of Court—Portions charged on Real Estate—Equitable Charge—Legal Mortgage.*

A testator who died in 1851 charged three sums of 5000*l.* for children's portions on his real estate. In 1880 two of the portions had become raisable, and in an action brought for the purpose of clearing the estate from charges, an order was made in May, 1882, directing that the two portions should be raised by a mortgage of the estate to be settled by the judge to a person who was then willing to lend the money. The mortgage as settled contained recitals of the title to the portions and of the proceedings in the action, and was expressed to be without prejudice to any charge which might be subsisting in the mortgaged hereditaments under the will. The money was paid into court by the mortgagee, and was afterwards distributed among the persons interested in the two portions. The estate being now believed to be insufficient to pay the whole of the said portions, the mortgagee commenced the present action for the realization of his mortgage, and claimed priority over the persons interested in the remaining portion :—

Held, on the construction of the proceedings in the action, the judgment obtained, and the circumstances under which it was given, that no interference with the charge of the remaining portion was contemplated or authorized, and that there was nothing in the form of the mortgage settled by the judge which entitled the plaintiff to more than a charge on the estate for the two sums of 5000*l.*, pari passu with the third 5000*l.* charged thereon in equity by virtue of the will.

Decision of Kekewich J., [1902] 2 Ch. 117, affirmed. NIGHTINGALE *v.* REYNOLDS **C. A. 236**

MORTGAGE—*continued.*

4. —— *Receiver—Second Mortgagees' Action for a Receiver—Back Rents paid to Receiver—Right of first Mortgagee against Receiver.*

In an action by second mortgagees against the mortgagor, to which the first mortgagee was not a party, a receiver was appointed of the rents of mortgaged premises subject to the rights of the first mortgagee. On motion in the action by the first mortgagee to discharge the receiver and to be let into possession :—

Held, that the first mortgagee was entitled to back rents paid to the receiver after the date of the service of his notice of motion. PRESTON *v.* TUNBRIDGE WELLS OPERA HOUSE, LIMITED **Farwell J. 323**

5. —— *Redemption, Clog on Equity of—Stock—Limited Company, Mortgage by—Option to purchase Mortgaged Stock—Debenture Stock—Redeemable Stock—Irredeemable Stock, Power to issue.*

A loan was made to a limited company on the terms of a letter whereby the borrowers agreed to secure the repayment of the loan with interest by the transfer of certain redeemable debenture stock of the company, and it was stipulated that the lender should have the option of purchasing the whole or any part of the debenture stock at 40 per cent. at any time within twelve months, and that the advance should become due and payable with interest at thirty days' notice on either side :—

Held, affirming the decision of Kekewich J., [1902] 2 Ch. 479, that, within the principle laid down in *Noakes & Co., Ld.* v. *Rice*, [1902] A. C. 24 ; [1900] 2 Ch. 445, 457, the stipulation giving the option to purchase the mortgaged stock was a clog or fetter on the right of redemption and therefore void.

Carritt v. *Bradley*, [1901] 2 K. B. 550, distinguished.

The rule prohibiting the clogging of the equity of redemption under a mortgage by an individual applies equally to a mortgage by a limited company.

Whether a limited company can issue irredeemable debenture stock, *quære*. JARRAH TIMBER AND WOOD PAVING CORPORATION, LIMITED *v.* SAMUEL - - - - **C. A. 1**

—— Company — Debenture stock — "Charge created by the company"—Registration *See* COMPANY. 3. **527**

—— Equitable execution — Effect of order—Notice to executor—Subsequent mortgagees and judgment creditors — Priority - - - - **727**
See RECEIVER.

—— Marshalling for payment of mortgage—Priority for cestui que trust - **494**
See VOLUNTARY SETTLEMENT.

—— Policy of insurance of mortgage debt—Contract whether of insurance or suretyship - - - - - **670**
See PRINCIPAL AND SURETY.

—— Priority — Assignment of book debts — "Floating charge"—Debenture-holders *See* COMPANY. 6. **284**

MOTION—For attachment—Affidavit in support—Service of exhibits - - 312
See ATTACHMENT.

NEGLIGENCE—Liquidator—Damages—Advertisement for creditors - - 625
See COMPANY. 8.

NOTICE—Building scheme—Restrictive stipulations—Right to enforce - - 212
See BUILDING.

—— Debentures — Bank — Equitable incumbrancers—Priority - - - 654
See COMPANY. 4.

—— Equitable assignment—Priority—Fund in court—Stop order - - - 26
See HUSBAND AND WIFE. 1.

—— Equitable execution — Effect of order—Notice to executor—Subsequent mortgagees and judgment creditors - 727
See RECEIVER.

OFFICIAL REFEREE—Judgment entered in pursuance of direction of referee—Mode of appealing - - - 475
See PRACTICE. 2.

OPEN SPACES—Disused burial ground—Adjacent landowner—Right to access of light - - - - 556
See BURIAL.

ORNAMENTAL TIMBER—Equitable waste—Evidence—Injunction - - 664
See WASTE.

PARISH—Transfer of land from one parish to another—Alteration of boundaries of union - - - - 142
See LOCAL GOVERNMENT.

PARLIAMENTARY DEPOSIT—Railway company—Abandonment—Costs of inquiries necessary for distribution of deposit 711
See PRACTICE. 3.

PARTNERSHIP — Attachment, Motion for — Undertaking—Debtors Act - 312
See ATTACHMENT.

—— Solicitor—Liability for acts of partner—Title-deeds - - - - 615
See SOLICITOR. 3.

PATENT — *Disclaimer — Revocation — Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20.

A petition was presented for the revocation of a patent granted in 1893. The complete specification contained references to several annexed plans or figures. One of the figures purported to shew a mode of working the invention which in practice was shewn to be unworkable. Another figure shewed a mode of working which was on a principle different from the principle on which the provisional specification was framed, and this part of the claim was held bad for disconformity. It was held that the patent would be good on its being amended by a disclaimer in respect of the two parts of it above mentioned:—

Held, that the proper order was that the

PATENT—*continued.*

patent should be revoked, unless within three months from its date, or such further time as the Court might allow, the patentee should obtain leave to amend his patent by disclaimer, but on the terms that no injunction should be asked in any action brought for infringement of the patent in respect of any articles made prior to the date of the order, unless (using the words of s. 20 of the Patents, Designs, and Trade Marks Act, 1883) the patentee should "establish to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge." *In re* GEIPEL'S PATENT
Buckley J. 715

PERPETUATING TESTIMONY—Examination. Order for—Discretion of Court - 378
See LEGITIMACY.

PERPETUITY—*Remoteness—Devise—Contingent Remainder—Equitable Estate—Estate Tail—Child en ventre sa mère—Retrospective Operation of Gift—Relation back.*

A testatrix devised real estate to trustees upon trust to pay the income to M. during her life, and after her death to stand possessed of the corpus upon trust for the second and every younger son of M., "born or to be born," successively, during his life, with remainder, after the death of each such son, upon trust for his first and other sons, successively, in tail male.

The testatrix died in October, 1880, at which date M. had had (*a*) a son who died in 1887, (*b*) a son who was disqualified by the will from taking under the limitations, and she was pregnant of (*c*) a third son, S., who was born in February, 1881. M. died in 1886, S. being then still living:—

Held, affirming Buckley J., [1903] 1 Ch. 874, that the limitations after S.'s life estate were valid as not transgressing the rule against perpetuities.

For the purpose of deciding a question of perpetuity arising upon a gift such as the above, there is an established rule that a child en ventre sa mère at the time of the testator's death, who is subsequently born, must be treated as having been alive at the testator's death (*Long* v. *Blackall*, (1797) 7 T. R. 100; 4 R. R. 73); and that rule is not to be departed from merely because it may be in the interest of the child to contend that the gift is void as infringing the rule against perpetuity. *In re* WILMER'S TRUSTS. MOORE *v.* WINGFIELD - - - - C. A. 411

PLANS—Approval of—Building line—"Written consent" of urban authority - 431
See STREETS.

POLICY.
See under INSURANCE and INSURANCE, LIFE.

PORTIONS—Charged on real estate—Mortgage by direction of Court—Priority - 236
See MORTGAGE. 3.

"POSSESSION"—"Tenant for life" - 16
See SETTLED LAND. 3.

POWER OF APPOINTMENT—*Excessive Appointment—Appointment under Special Power to Uses of existing Settlement, or such as are "capable of*

POWER OF APPOINTMENT—*continued.*

taking effect"—Validity of Limitation—Remoteness—Construction of will.

Where under a special power of appointment a testator appoints to the uses or trusts of an antecedent instrument or such of them as are "capable of taking effect," the phrase "capable of taking effect" may be construed as meaning what the law allows to take effect, and need not be confined to a reference to the uses or trusts which, by reason of the deaths of parties and other intervening circumstances, are still in fact existing, or capable of coming into existence; and if therefore some of the uses or trusts fail by reason of the cestuis que trust not being objects of the power, or by reason of the rule against perpetuities being infringed, those uses or trusts may be treated as excluded from the appointment.

Dictum of Jessel M.R. in *Line* v. *Hall*, (1873) 43 L. J. (Ch.) 107, 108, considered and applied. *In re* FINCH AND CHEW'S CONTRACT
Kekewich J. 486

—— Covenant to settle after-acquired property—Power or property - - **574**
See SETTLEMENT. 1.

—— Jointuring—Execution of power by testamentary instrument - - **461**
See STATUTE.

—— Trustees, Appointment of new—Donee of power appointing himself—Validity of appointment - - - **723**
See TRUSTEE. 1.

POWER OF SALE—Friendly society, Mortgage to—Sale by auction—Purchase by officer of society—Invalidity - - **647**
See MORTGAGE. 2.

PRACTICE—*Appeal—Application for Judgment under Order XIV.—Condition of Leave to Defend—Security to Satisfaction of Master—Decision of Master as to Sufficiency of Security—Appeal from Master—Order XIV., r. 6—Order LIV., r. 21.*

Where under Order XIV., r. 6, leave to defend an action is given to the defendant on giving security for the amount claimed to the satisfaction of a master, there is no appeal from the decision of the master with regard to the sufficiency of the security tendered. HOARE & Co. *v.* MORSHEAD - - - - **C. A. 359**

2. —— *Appeal—Official Referee—Procedure—Action in Chancery Division—Whole Action referred to Official Referee—Judgment entered in pursuance of Direction of Referee—Mode of appealing—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19—*Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 5—*Rules of Supreme Court, Order V., r.* 9; *Order XXXVI., rr.* 7 (*a*), 48-55, 55*c*; *Order XL., rr.* 2-6; *Order LVIII., rr.* 1, 17.

When in an action in the Chancery Division the whole action has been referred to an official referee for trial, and judgment has been entered in pursuance of his direction, an appeal from the judgment does not lie to the Court of Appeal, but an application to set aside the judgment must be made to the judge of the Chancery Division to whom the action is assigned.

PRACTICE—*continued.*

Serle v. *Fardell*, (1890) 44 Ch. D. 299, not followed.

Sect. 1, sub-s. 5, of the Judicature (Procedure) Act, 1894, applies only to appeals from inferior Courts; it does not apply to an appeal from a judgment or order of the High Court.

Daglish v. *Barton*, [1900] 1 Q. B. 284, disapproved. WYNNE-FINCH *v.* CHAYTOR **C. A. 475**

3. —— *Costs—Railway Company—Parliamentary Deposit—Abandonment—Costs of Inquiries necessary for Distribution of Deposit.*

By a railway company's Act and the Act for its abandonment the parliamentary deposit was directed to be applied in payment, first, of compensation to landowners, and, secondly, of creditors, and subject thereto to be repaid to the depositors. The depositors took out a summons for distribution of the deposit, and an order was made directing inquiries whether there were any landowners or others entitled to compensation, and any debts which ought to be paid out of the deposit. These inquiries were conducted by the depositors, and resulted in a certificate that no one was entitled to compensation; that the claim of one creditor must be disallowed; but there were debts which ought to be paid out of the deposit exceeding its amount:—

Held, on a summons taken out by the depositors, that they could not be allowed the costs of the inquiries in priority to payment of the creditors' debts.

In re Wrexham, Mold and Connah's Quay Ry. Co., [1900] 1 Ch. 261, distinguished. *In re* LANCASHIRE, DERBYSHIRE AND EAST COAST RAILWAY ACTS, 1891 TO 1896, AND *In re* LINCOLN AND EAST COAST RAILWAY ACTS, 1897 TO 1902
Farwell J. 711

4. —— *Costs—Taxation—Common Order—Extension of Time—Jurisdiction of Taxing Master—Rules of the Supreme Court*, 1883, *Order LXV., r.* 27, *sub-r.* 57.

The common form of order for taxation of a bill of costs, when the order is made upon the application of the client after the expiration of one month but before the expiration of twelve months from the delivery of the bill, provides that the taxing master "is to make his certificate in a month (unless the said master shall extend the time to enable him to make his certificate), or this order is to be of no effect."

By Order LXV., r. 27, sub-r. 57, where a time is appointed for any proceeding before the taxing master, unless the Court or judge shall otherwise direct, the taxing master is empowered to extend the time, even though the application for extension is made after the appointed time:—

Held, upon the construction of the order for taxation read in conjunction with sub-rule 57, that the taxing master had power to grant an extension of the time after the expiration of the month appointed by the order for the making of his certificate.

Decision of Byrne J., W. N. (1903) 95, reversed.

Per the Court of Appeal: The power of the taxing master to extend the time under an order in this form ought not to be exercised as of course or freely. *In re* MACINTOSH AND THOMAS **C. A. 394**

PRACTICE—*continued.*

5. —— *Costs — Taxation—"Instructions for Originating Summons"—Rules of Supreme Court, Order* LXV., *rr.* 8, 27, *sub-rr.* 29, 37—*Appendix N, No.* 65—*Order of January*, 1902, *r.* 10—*Practice Notes of the Masters of Hilary Sittings*, 1902—*The "Blue Book"—Discretion of Taxing Officer.*

Under rule 8 of Order LXV., and rule 10 of January, 1902 (which is the new sub-rule 29 of rule 27 of the same order), the discretion of the taxing officer is no longer limited to the maximum fee prescribed by Appendix N; but under these regulations he has now on every taxation a two-fold discretion—first, in ordinary cases, the discretion conferred on him by Appendix N, and, in addition to that, a general discretion in special cases to allow all such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party.

The Practice Notes of the Masters of Hilary Sittings, 1902—known as the "Blue Book"—though framed and issued by them under the power conferred on them by sub-rule 37 of rule 27 of Order LXV., have no statutory authority, and do not abrogate or fetter the discretion given them by the Rules of the Supreme Court. They merely define the practice which, as a general rule, should be followed by the masters on taxations.

McIver & Co., Ld. v. *Tate Steamers, Ld.*, [1902] 2 K. B. 184, followed. *In re* ERMEN. TATHAM *v.* ERMEN - - - Farwell J. 156

—— Arbitration.
See under ARBITRATION.

—— Costs —Company—Winding-up petition — Contributories and creditors supporting successful party - - - 373
See COMPANY. 9.

—— Costs — Foreclosure — Account — Repairs—Receiver - - - - 567
See MORTGAGE. 1.

—— Costs — Railway company—Parliamentary deposit—Abandonment — Costs of inquiries necessary for distribution of deposit - - - - 711
See PRACTICE. 3.

—— Costs—Solicitors' costs.
See under SOLICITOR.

—— Costs—Taxation—Common order — Extension of time—Jurisdiction of taxing master - - - - 394
See PRACTICE. 4.

—— Costs — Taxation — Counsel's fees — Judgment, Attending to hear - - 40
See LANDLORD AND TENANT. 4.

—— Costs—Trustee, Bill payable by—Beneficiaries, Taxation by—Prospective costs
See SOLICITOR. 1. 518

—— Joinder of Attorney-General—Local authority—Extent of powers - - 556
See BURIAL.

—— Service of exhibits—Motion for attachment—Affidavit in support - - 312
See ATTACHMENT.

PRACTICE—*continued.*

—— Stay of proceedings—Company—Winding-up - - - - - 174
See COMPANY. 10.

—— Stay of proceedings—Step in proceedings—Application for stay — Summons for directions - - - - 222
See ARBITRATION.

PRESUMPTION—Dedication—Roadside strip
See HIGHWAY. 638

—— Resulting trust—Evidance—Capital or income - - - - - 98
See HUSBAND AND WIFE. 2.

PRINCIPAL AND SURETY—*Insurance of Securities—Policy of Insurance of Mortgage Debt—Contract whether of Insurance or Suretyship—Co-sureties — Covenant by Surety to pay whole Debt with a Limit to Liability—Contribution—Proportion.*

H. mortgaged a leasehold public-house by demise to a bank for 4000*l.* The mortgage deed contained a joint and several covenant by H. and a surety to pay principal and interest, with a proviso that the liability of the surety should be limited to 1000*l.* The deed also contained a covenant by H. alone to insure the mortgage debt and interest with the plaintiff company in the name of the bank. An insurance was accordingly effected with the plaintiff company by a document called a policy, whereby the company agreed that if the mortgagor made default the company would pay the principal and interest; and it was provided that thereupon the bank (therein called the insured) should assign the mortgage debt and all securities to the company, and do all things necessary for the purpose of enforcing any rights or remedies, or of obtaining relief or indemnity from other parties to which the company should be subrogated upon payment under the policy. The mortgagor made default; the company paid the mortgage debt, interest, and costs, and moneys expended in preservation of the property, amounting in all to nearly 5000*l.* They realized 4000*l.* from the security. The surety had died before the security was realized. The company brought this action against his legal personal representatives to recover the whole balance:—

Held, that the contract of the company with the bank was one of suretyship and not of insurance; but that whether the contract were one of surety or insurance, the company and the surety were in the position of persons under a common liability arising in the same transaction which had been paid by one of them. They were therefore liable to contribute in proportion to the amounts for which they were respectively liable—namely, the surety one-sixth and the company five-sixths of the loss. *In re* DENTON'S ESTATE. LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON
Swinfen Eady J. 670

PRIORITY — Debenture-holders — Receiver — Rolling stock—Proceeds of sale - 681
See RAILWAY.

—— Debentures — Bank — Equitable incumbrancers—Notice - - - 654
See COMPANY. 4.

PRIORITY—*continued.*

—— Equitable assignment — Fund in court—Notice—Stop order - - 26
See HUSBAND AND WIFE. 1.

—— Equitable Execution—Effect of order—Unascertained residue—Charging order
See RECEIVER. 727

—— Marshalling for payment of mortgage—Priority of cestui que trust - 494
See VOLUNTARY SETTLEMENT.

—— Mortgage — Assignment of book debts — "Floating charge" — Debenture-holders - - - - 284
See COMPANY. 6.

—— Portions charged on real estate—Equitable charge—Mortgage by direction of Court
See MORTGAGE. 3. 236

PROMOTER — Undisclosed agreement for promoter participating in vendor's shares
See COMPANY. 10. 174

PUBLIC HEALTH—Buildings in streets—Approval of plans—"Written consent" of urban authority - - - 431
See STREETS.

—— "Sewer," Meaning of — Local authority, Duty of—Cleansing sewers - 695
See SEWERS.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

RAILWAY — *Receiver — Rolling Stock—Proceeds of Sale — Debenture-holders — Priority — Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 4, 23.

Rolling stock and other chattels of an insolvent railway company were sold to another railway company under the provisions of a statutory agreement which directed the proceeds of sale to be paid to a receiver already appointed under s. 4 of the Railway Companies Act, 1867, and gave the purchasing company the exclusive right of working the insolvent company's railway for ten years on certain terms:—

Held, that the proceeds of sale constituted money received by the receiver within the meaning of s. 4, and the holders of mortgage debentures charging the undertaking were therefore entitled to those proceeds under s. 23 in priority to unsecured creditors.

Yorkshire Railway Wagon Co. v. *Maclure*, (1882) 21 Ch. D. 309, 314, and *In re Hull, Barnsley and West Riding Junction Ry. Co.*, (1888) 40 Ch. D. 119, 130, applied. *In re* LISKEARD AND CARADON RAILWAY COMPANY
Swinfen Eady J. 681

—— Costs of inquiries necessary for distribution of deposit — Parliamentary deposit — Abandonment - - - 711
See PRACTICE. 3.

RECEIVER — *Equitable Execution — Effect of Order — Unascertained Residue — Fund partly in Court — Notice to Executor — Subsequent Mortgagees and Judgment Creditors — Stop Order — Charging Order — Priority.*

A receivership order obtained by a judgment creditor by way of equitable execution over a judgment debtor's share of a testator's residuary personal estate, partly in court in an administration action and partly in the hands of the executor who has direct notice of the order, though not creating a charge, prevents the judgment debtor from receiving the share, or from dealing with it to the prejudice of the judgment creditor, and if, at the date of the receivership order, the residue is unascertained, and the fund then in court is insufficient for the testator's debts, so that the judgment debtor's share cannot then be taken in execution or made available by any other legal process, it prevents any subsequent mortgagee or judgment creditor from gaining priority by means of a stop order or charging order. *In re* MARQUIS OF ANGLESEY. COUNTESS DE GALVE *v.* GARDNER - Swinfen Eady J. 727

—— Back rents paid to receiver—Right of first mortgagee against - - - 323
See MORTGAGE. 4.

—— Foreclosure—Account—Cost of repairs 567
See MORTGAGE. 1.

—— Rolling stock—Proceeds of sale—Debenture-holders—Priority - - 681
See RAILWAY.

REDEMPTION—Clog on equity of—Company—Irredeemable stock, Power to issue 1
See MORTGAGE. 5.

REFEREE—Judgment entered in pursuance of direction of—Mode of appealing - 475
See PRACTICE. 2.

REFERENCE TO ARBITRATION.
See under ARBITRATION.

REGISTRATION—Company—Debenture stock—Covering deed—"Charge created by the company" - - - - 527
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—— Deeds of arrangement — Company—Creditors—Agreement for composition 590
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REMOTENESS — Appointment, Excessive — Validity of limitation - - 486
See POWER OF APPOINTMENT.

—— Child en ventre sa mère—Retrospective operation of gift - - - 411
See PERPETUITY.

REMOVAL—Tenant's right of — Trade fixtures—Covenant—General words - 268
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RENEWAL—Lease—Fine—Interest - 65, n.
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—— Lease—Renewal by one tenant in common—Fiduciary relation - - 40
See LANDLORD AND TENANT. 4.

RENT—Back rents paid to receiver—Right of first mortgagee against receiver - 323
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REPAIRS—Foreclosure—Account—Cost of repairs—Receiver - - - 567
See MORTGAGE. 1.

REPUGNANCY—Absolute gift—Gift over on death "without a will and childless"
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RESCISSION—Mistake—Life policy, Sale of—Death of assured before contract - 249
See INSURANCE, LIFE. 1.

RESIDUE—Unascertained—Equitable execution—Effect of order—Notice to executor—Charging order—Priority - 727
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RESTRICTIVE COVENANT—Building restrictions—One house—Double-tenement house - - - - 522
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—— Building scheme—Alteration of character of neighbourhood—Acquiescence in breaches - - - - 446
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—— Right of action by personal representative against assign or covenantor - 539
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RESTRICTIVE STIPULATIONS — Right to enforce—Building scheme—Notice 212
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RESULTING TRUST—Presumption—Evidence—Capital or income - - - 98
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RETROSPECTIVE EFFECT—Company—Altered articles of association—Contract - 506
See COMPANY. 1.

RETROSPECTIVITY — Remoteness—Contingent remainder—Child en ventre sa mère—Retrospective operation of gift - 411
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REVENUE — *Estate Duty—Incidence—Legacies payable out of Fund representing Realty and Personalty—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 8 (*sub-s.* 4), 9, 14 (*sub-s.* 1), 21.

A testator who died in 1869 (and therefore before the coming into operation of the Finance Act, 1894), after bequeathing certain legacies, gave his residuary realty and personalty to trustees upon trust to convert the same and pay his funeral and testamentary expenses and debts and the legacies thereinbefore bequeathed, and to invest the residue, and out of the income to pay his widow an annuity of 500*l.* And he directed that after the widow's death the trust funds should be held upon trust to pay thereout certain legacies amounting to 9000*l.*, and to divide the residue amongst certain persons named in the will. In an administration action a sum of Consols was carried over to the account of the annuity. The widow died in 1900 (after the Act came into operation), and in 1901 payment of the legacies was ordered, and inquiries were directed to ascertain the persons entitled to the residue.

Under s. 1 of the Finance Act, 1894, estate duty was payable on the widow's death on so much of the Consols as represented real estate; but under s. 21, sub-s. 1, the duty was not payable on the portion representing personal estate. The proportion representing real estate was taken as twelve-seventeenths of the whole fund, and the estate duty on twelve-seventeenths of the legacies (9000*l.*) was 223*l.* That and the legacy duty were paid, and the difference between the aggregate of the two sums and the 9000*l.* was paid to the legatees:—

Held, by Buckley J., that the pecuniary legatees were not persons entitled to a sum charged on the property within s. 14, sub-s. 1, and that they were not liable for the 223*l.*, but were entitled to be recouped the amount out of the portion of the fund representing real estate:

Held, by the Court of Appeal, upon the construction of s. 8, sub-s. 4, that the pecuniary legatees ought to bear the 223*l.*

Per Vaughan Williams L.J.: *In re Countess of Orford*, [1896] 1 Ch. 257, is a decision on the construction of the Finance Act, 1894, that in all cases where estate duty becomes payable for which the executor is not made accountable by s. 6, sub-s. 4, the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares. BERRY *v.* GAUKROGER **C. A.** 116

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—— Estate duty—Tenant for life—Instalments, Duty payable by—Interest on unpaid duty—Charge on inheritance - 69
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REVOCATION—Patent—Disclaimer. - 715
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ROLLING STOCK—Receiver—Proceeds of sale—Debenture-holders—Priority - 681
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ROYAL CHARTER—Treasure trove—Grant of lands to subjects—Construction—General words - - - - 598
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RULES OF SUPREME COURT:—**Order V., r. 9**—*Issue of Writs of Summons* - 475
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—— **Order XXV., r. 5**—*Proceedings in lieu of Demurrer* - - - - 112
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—— **Order XXX., r. 4**—*Summons for Directions*
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—— **Order XXXVII., r. 35**—*Evidence* - 378
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—— **Order XL., rr. 2–6**—*Motion for Judgment*
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—— **Order LII., r. 4**—*Motions and other Applications* - - - - 312
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—— **Order LVIII., rr. 1, 17**—*Appeals to the Court of Appeal* - - - 475
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—— **Order LXV., rr. 8, 27, sub-rr. 29, 37, App. N, No. 65**—*Costs* - - - 156
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SALE — Convict's property — Administrator — Bona fides—Discretion - - 279
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—— Vendor and Purchaser.
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SATISFACTION—Insurance, Life—Covenant for payment to trustees — Policies subsequently effected by settlor for benefit of Wife and children—Settlement - 306
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SERVICE—Exhibits—Motion for attachment—Affidavit in support - - 312
See ATTACHMENT.

SETTLED LAND—*Compound Settlement—Trustees for Purposes of Settled Land Acts — Power of Tenant for Life to Sell—Settlement by Will—Tenant for Life—Jointure Deed under Power in Will—Mortgages by Tenant for Life—Re-settlement by Deed—New Life Estate "in Restoration of former Life Estate" under Will—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 20, 38, 40, 50 *—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 4.

In 1850 lands stood limited under a will to the use of A. for life, with remainder to his first and other sons successively in tail male. In 1872 A., upon his marriage and in exercise of a power given him by the will, by deed charged the lands with a jointure in favour of his wife. He also created mortgages on his life estate. In 1895 A. and his only son by a disentailing assurance conveyed the lands to such uses as A. and his son should by deed jointly appoint; and by a deed of even date they appointed the lands to the use of A. for life "in restoration and continuation of his former life estate under the will," with remainder to the son in fee simple, and by this deed trustees were appointed for the purposes of the Settled Land Acts. A., as tenant for life under the resettlement of 1895, contracted to sell part of the lands, the jointress and mortgagees being willing to concur and release their interests in the conveyance to the purchaser:—

Held, that A.'s life estate under the will was still subsisting; that the will, jointure deed, disentailing assurance, and resettlement together constituted one compound settlement of which there were no trustees for the purposes of the Settled Land Acts, and therefore that A. could not make a good title.

In re Mundy and Roper's Contract, [1899] 1 Ch. 275, followed. *In re* CORNWALLIS-WEST AND MUNRO'S CONTRACT - **Farwell J. 150**

2. —— *Estate Duty—Settled Estate—Tenant for Life—Instalments, Duty payable by—Interest on Unpaid Duty—Charge on Inheritance—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-s.* 8; *s.* 9, *sub-s.* 5.

The general rule that, in the absence of special circumstances, the tenant for life of a settled estate is bound to keep down the interest on charges on the inheritance, is not affected by the Finance Acts, 1894 and 1896; so that, although under the power given to him by s. 9, sub-s. 5, of the Act of 1894 he may charge the inheritance with instalments of estate duty payable by him under s. 6, sub-s. 8, he cannot also charge it under s. 9, sub-s. 5, with the interest

SETTLED LAND—*continued.*

on the unpaid portion of the duty unless he can shew that such interest has been "properly incurred by him."

Decision of Buckley J. affirmed. *In re* EARL HOWE'S SETTLED ESTATES. EARL HOWE *v.* KINGSCOTE - - - - **C. A. 69**

3. —— *"Tenant for Life"—"Possession"—Settlement—Trust to keep up Mansion-house and permit A. to reside—Management, Trustees' wide Powers of—Rents and Profits, Receipt of by Trustees —Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5.

A testatrix devised all her real estate to trustees upon trust "to enter into possession or receipt of the rents and profits of or to manage or superintend the management of the same." The will gave the trustees extensive powers of management. The testatrix then directed the trustees to pay certain annuities to her daughter, and, subject thereto, to apply such annual sums as should be necessary for keeping certain mansion-houses and the gardens and grounds thereof "in a fit state for residence," including the payment of wages of all servants and other persons employed by the trustees in and about such mansion-houses, gardens, and grounds, "and shall permit my said daughter at any time and from time to time during her life to reside at the said mansion-houses, gardens, and grounds"; and that during any and every such residence by her said daughter, "under such permission as aforesaid," the trustees should, out of the rents and profits (subject to the prior payments thereout thereinbefore directed), pay to her said daughter an allowance of 80*l.* per week during such residence. And the testatrix, after giving similar rights of residence to grandchildren, directed that the furniture, &c., in the said "residences" respectively should be annexed thereto as heirlooms to be enjoyed by the person or persons for the time being entitled to the same residences under the limitations thereinbefore directed:—

Held, that the daughter came within the definition of a "tenant for life" in s. 2, sub-s. 5, of the Settled Land Act, 1882, as being "the person for the time being beneficially entitled to possession of settled land for her life."

Decision of Swinfen Eady J., [1902] 2 Ch. 679, affirmed, with a variation.

Per Romer L.J.: The policy of the law is to regard the provisions of the Settled Land Acts as being beneficial, and not to cut down the class or number of persons coming within the definition of "tenant for life." *In re* BARONESS LLANOVER'S WILL. HERBERT *v.* FRESHFIELD - **C. A. 16**

4. —— *Tenant for Life, Persons having together the Powers of a—Annuitants entitled to Rents and Profits of Land—Settlement—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 *sub-ss.* 5, 6, 58 *sub-s.* 1 (*ix.*).

A testator devised his residuary real and personal estate to trustees upon trust to pay out of the rents and profits several life annuities to persons specified, and directed that if in any year there should be a surplus of the income of his residuary real and personal estate over the total amount of the annuities, the trustees should divide the same between such of the annuitants

SETTLED LAND—*continued.*
as should be living in shares proportionate to the amount of the annuities to which they should be then entitled:—

Held, that as the annuitants for the time being were, between them, entitled to the entire rents and profits of the residuary real estate, they were persons having together the powers of a tenant for life under s. 58 of the Settled Land Act, 1882. *In re* BENNET. BENNET *v.* BENNET **Kekewich J. 136**

—— Jointuring—Execution of power by testamentary instrument - - **461**
See STATUTE.

—— Tenant for life—Will—Forfeiture of life interest — "Alienate or incumber" — Petition in bankruptcy by tenant for life - - - - - **705**
See WILL. 3.

SETTLEMENT—*Covenant to settle After-acquired Property—Power or Property—Property subject to General Power of Appointment.*

A covenant for settlement of after-acquired property extends to property which is limited to such purposes as the covenantor shall appoint, and in default of appointment to him or her absolutely.

A marriage settlement contained a covenant that any property exceeding 200*l.* in value which the wife should become possessed of or entitled to should be brought into settlement. Property, exceeding 200*l.* in value, was subsequently bequeathed in trust for such purposes as she should appoint, and in default of appointment to her absolutely for her separate use. She executed deeds-poll purporting to appoint out of the property several sums of 199*l.* each to herself absolutely:—

Held, that, notwithstanding the general power of appointment, the bequeathed property was bound by the covenant, and the deeds-poll were therefore ineffectual.

Steward v. *Poppleton*, W. N. (1877) 29, followed.

Townshend v. *Harrowby*, (1858) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353, distinguished. *In re* O'CONNELL. MAWLE *v.* JAGOE - **Kekewich J. 574**

2. —— *Die "without having been Married"—Marriage Settlement — Construction — Ultimate Trust of Wife's Property.*

Wilson v. *Atkinson*, (1864) 4 D. J. & S. 455, must not be taken to have laid down as a general rule that, in the ultimate trust of the wife's property contained in a marriage settlement for the wife's statutory next of kin as if she had died intestate and "without having been married," the words must always be construed so as not to exclude issue of the wife.

The view of *Wilson* v. *Atkinson* expressed by Jessel M.R. in *Emmins* v. *Bradford*, (1880) 13 Ch. D. 493, and by Swinfen Eady J. in *In re Smith's Settlement*, [1903] 1 Ch. 373, adopted, and the contrary view expressed by Fry. J. in *Upton* v. *Brown*, (1879) 12 Ch. D. 872, by Chitty J. in *Stoddart* v. *Saville*, [1894] 1 Ch. 480, and by Kekewich J. in *In re Mare*, [1902] 2 Ch. 112, disapproved.

The words in question ought primâ facie to

SETTLEMENT—*continued.*
be construed according to their natural meaning, which would exclude issue of the wife, unless there be something in the context or in the circumstances of the case which shews that the words were not intended to bear that meaning.

By a settlement made on the marriage of a spinster a fund belonging to her was vested in trustees, upon trust to pay the income to her during the joint lives of herself and her husband, and after the death of either of them to pay the income to the survivor during his or her life, and after the death of the survivor to hold the fund in trust for the child or children of the marriage as the husband and wife should by deed jointly appoint, and in default of appointment as the survivor should by deed or will appoint, and in default of appointment in trust for the children of the marriage equally who being sons should attain twenty-one, or being daughters should attain twenty-one or marry. If there should be no child, who being a son should attain twenty-one, or being a daughter should attain that age or marry, then, without prejudice to the prior trusts, if the wife should die before the husband, the trustees were, after his death and such default or failure of children, to hold the fund upon such trusts as the wife should by will appoint, and in default of appointment upon trust for the persons who would have been entitled thereto as her statutory next of kin at her death "if she had died possessed thereof intestate and without having been married."

The marriage took place in 1870. The wife died in 1871, intestate, leaving twin infant children, who both died a few months after their mother. In 1901 the husband died. No appointment had been made under the powers contained in the settlement:—

Held, that the sole statutory next of kin of the wife at the time of her death (excluding the infant children) was entitled to the fund.

Decision of Kekewich J. reversed. *In re* BRYDONE'S SETTLEMENT. COBB *v.* BLACKBURNE **C. A. 84**

—— Insurance, Life—Covenant for payment to trustees—Satisfaction - - **306**
See INSURANCE, LIFE. 2.

—— Settled Land.
See under SETTLED LAND.

—— Voluntary.
See under VOLUNTARY SETTLEMENT.

SEWERS—"*Sewer*," *Meaning of—Local Government—Duty of Local Authority—Cleansing Sewers—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 19, 21.

At the side of a road, which was vested in a local authority, was an open channel (not paved with stone and not very clearly defined on the side toward the centre of the road) made for the purpose of carrying off the surface water from the road. In the channel were gullies by which the water passed through pipes into an underground drain. Rain water from the roofs and the curtilages of many of the houses in the road (including the plaintiff's) also passed through pipes into the channel. Sewage from one of the houses (not the plaintiff's) had escaped into the channel, and

SEWERS—*continued.*
had caused an illness of the plaintiff's child, and the plaintiff had thereby incurred expense.

In an action by the plaintiff against the local authority claiming an injunction and damages:—

Held, that the channel was a "sewer" within the definition contained in s. 4 of the Public Health Act, 1875, and that under s. 19 it was the duty of the defendants to cleanse the channel so that it should not be a nuisance or injurious to health.

An injunction was accordingly granted to restrain the defendants from permitting any foul or noxious matter to remain in the channel so as to cause a nuisance to the plaintiff, and 30*l.* damages was awarded to him.

Decision of Phillimore J. affirmed.

Per Vaughan Williams L.J.: *Kinson Pottery Co.* v. *Poole Corporation*, [1899] 2 Q. B. 41, is not a decision that a drain may be a sewer for some of the purposes of the Public Health Act and not for others. WILKINSON *v.* LLANDAFF AND DINAS POWIS RURAL DISTRICT COUNCIL - C. A. 695

—— Covenant—"Impositions"—Three years' tenancy - - - - 367

See LANDLORD AND TENANT. 2.

SOLICITOR—*Costs—Bill payable by Trustees—Taxation by Beneficiaries—Incidence of Costs—Final Distribution of Estate—Prospective Costs—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 39.

Trustees having employed a solicitor in the distribution of a trust estate, certain beneficiaries obtained an order for the taxation of the solicitor's bill of costs under s. 39 of the Solicitors Act, 1843:—

Held, (1.) The costs must be taxed as between the trustees and their solicitor, and, if properly chargeable against the trustees as such, must be allowed out of the estate, irrespective of their ultimate incidence amongst the beneficiaries, which was a question outside the scope of such a taxation:—

(2.) The prospective costs of completing a final distribution might properly be included in such a bill. *In re* MILES - Swinfen Eady J. 518

2. —— *Costs—Taxation—Lessor and Lessee—Costs of Lease—Concurring Parties—Separate Solicitors—Collective Bill—Costs of Taxation.*

On taking a lease from a lessor and concurring parties represented by separate solicitors, the lessee, in the absence of agreement express or implied, is only liable for one set of costs.

If the lessor's solicitor includes the costs of the concurring parties' solicitors in his own bill, and more than one-sixth is taxed off the total amount, he must pay the costs of taxation, although less than one-sixth is taxed off his own costs.

In re Remnant, (1849) 11 Beav. 603, distinguished. *In re* FLETCHER AND DYSON
Swinfen Eady J. 688

3. —— *Partnership—Liability for Acts of Partner—Scope of Partnership—Title-deeds—Legal Estate in Trustee—Duty of Solicitor to Cestui que Trust—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 11 (*b*).

G., a partner in the firm of J. & G., solicitors, was secretary to a company. The company purchased property, and for their own convenience had it conveyed to G. in his own name without any declaration of trust in the conveyance. The transaction was carried through and the conveyance settled by the firm of J. & G. as the company's solicitors. The conveyance, the only title-deed handed over, was retained by G. G. fraudulently raised money by deposit of the conveyance, and afterwards executed a legal mortgage to the equitable mortgagee. J. had no notice that the conveyance had been made to G. alone, or of any part of the transaction, except such notice as was implied by his firm having acted for the company. The partnership deed made the secretaryship a part of the partnership business:—

Held, that G. having a legal right as trustee to the possession of the deed, it was no part of the duty of the firm to see that he did not obtain it without the direction of his cestui que trust, the company. Assuming that the firm would have been liable for any negligence of G. in his duty as secretary, it was no part of such duty to act as trustee of the company's property. J. was therefore not liable for his partner's fraud. TENDRING HUNDRED WATERWORKS COMPANY *v.* JONES - - - - Farwell J. 615

STATUTE—*Act of Parliament—Construction of Statutes—Private Act of Henry VIII.—Settled Estates—Tenant in Tail—Restriction on Alienation—Prohibition—Exception in favour of Jointuring—Power—Testamentary Instrument, Execution of Power by—Application of Modern Statutes to Old Statutes.*

By a private Act of 1535, 27 Hen. 8, real estates were limited to two persons respectively in tail, with cross remainders between them in tail, with a proviso that no tenant in tail should alien any of the settled estates nor do anything to the disinheritance of his heirs, "but only for the jointure of wife."

By a later Act of 1863, which recited the earlier Act, including the proviso, the powers of the Leases and Sales of Settled Estates Act, 1856, were made applicable to the estates. Certain sections of the Act of 1863 referred to "the powers of jointuring contained in" the Act of 1535, and s. 9 enacted that "the powers in the recited Act contained or implied of giving the said lands for the jointure of a wife" should be exercisable either previously to or after a marriage.

In 1901 M. became tenant in tail in possession of the estates and he died in 1902, having by a codicil to his will purported, "in the exercise of all powers contained in" the two private Acts, "or either of them," to appoint and give the estates to his wife (who survived him) for life "by way of jointure." The question being raised whether M. had power to appoint the income of the estates for the jointure of a surviving wife:—

Held (reversing Joyce J., W. N. (1902) 214), that although a power to jointure by "will" was not actually mentioned in the Act of 1535, and in fact could not have been then contemplated inasmuch as, apart from custom, a will had no operation before the Statute of Devises, 1540, 32 Hen. 8, c. 1, yet, upon the principle stated in *Vernon's Case*, (1572) 4 Rep. 1 a, 4 a, that "an Act

STATUTE—*continued.*
of late time shall be taken within the equity of an Act made long time before," a jointure under the power conferred upon a tenant in tail by the Act of 1535 could, under the present law, be well created by a testamentary instrument. *In re* BOLTON ESTATES. RUSSELL *v.* MEYRICK C. A. 461

—— Interpretation of statutes—Gas—Testing—"Daily" - - - - 532
See GAS.

STATUTES.

32 Hen. 8, c. 1—*Statute of Devises* - 461
See STATUTE.

1 Vict. c. 26, s. 24—*Wills* - - - 330
See ACCUMULATIONS.

6 & 7 Vict. c. 73, s. 39—*Solicitors* - 518
See SOLICITOR.

21 & 22 Vict. c. 27, s. 2—*Lord Cairns' Act* 337
See LIGHT.

21 & 22 Vict. c. 93, s. 1—*Legitimacy Declaration* - - - - - 378
See LEGITIMACY.

25 & 26 Vict. c. 89, s. 50—*Companies* - 506
See COMPANY. 1.

—— —— ss. 52, 67; Table A, art. 57 - 439
See COMPANY. 5.

—— —— s. 89 - - - - 174
See COMPANY. 10.

—— —— ss. 107, 133, 138, 143 - - 625
See COMPANY. 8.

30 & 31 Vict. c. 127, ss. 4, 23—*Railway Companies* - - - - 681
See RAILWAY.

32 & 33 Vict. c. 62, s. 4—*Debtors* - 312
See ATTACHMENT.

33 & 34 Vict. c. 23, ss. 12, 17, 18—*Forfeiture* 279
See FELONY.

36 & 37 Vict. c. 66, s. 19—*Judicature* 475
See PRACTICE. 2.

38 & 39 Vict. c. 55, ss. 4, 19, 21—*Public Health* 695
See SEWERS.

—— —— s. 156 - - - - 431
See STREETS.

40 & 41 Vict. c. 35, s. 1—*Metropolitan Open Spaces* - - - - 556
See BURIAL.

43 & 44 Vict. c. clxxxi, s. 7—*Gaslight and Coke and other Gas Companies Acts* - 532
See GAS.

44 & 45 Vict. c. 34, ss. 4, 5—*Metropolitan Open Spaces* - - - - 556
See BURIAL.

44 & 45 Vict. c. 41, s. 6, sub-s. 2—*Conveyancing and Law of Property* - 165
See WAY, RIGHT OF. 2.

—— —— ss. 19, 24, sub-s. 8 (iii.) - 567
See MORTGAGE. 1.

45 & 46 Vict. c. 38, s. 2, sub-s. 5—*Settled Land* 16
See SETTLED LAND. 3.

—— —— s. 2, sub-ss. 5, 6; s. 58, sub-s. 1 (ix.) 136
See SETTLED LAND. 4.

—— —— ss. 2, 20, 38, 40, 50 - - - 150
See SETTLED LAND. 1.

STATUTES—*continued.*

46 & 47 Vict. c. 52—*Bankruptcy* - 705
See WILL. 3.

46 & 47 Vict. c. 57, ss. 18, 19, 20—*Patents, Designs, and Trade Marks* - 715
See PATENT.

47 & 48 Vict. c. 72, s. 3—*Disused Burial Grounds* - - - - 556
See BURIAL.

50 & 51 Vict. c. 57, ss. 4, 5—*Deeds of Arrangement* - - - - - 590
See COMPANY. 2.

51 & 52 Vict. c. 41, ss. 57, 58—*Local Government* - - - - - 142
See LOCAL GOVERNMENT.

51 & 52 Vict. c. 52, s. 3—*Public Health—Buildings in Streets* - - 431
See STREETS.

52 & 53 Vict. c. 49, s. 4—*Arbitration* - 222
See ARBITRATION.

53 & 54 Vict. c. 39, s. 11 (*b*)—*Partnership* 615
See SOLICITOR. 3.

53 & 54 Vict. c. 63, s. 7—*Companies—Winding-up* - - - - - 174
See COMPANY. 10.

53 & 54 Vict. c. 69, s. 4—*Settled Land* - 150
See SETTLED LAND. 1.

55 & 56 Vict. c. 58, s. 1—*Accumulations* 330
See ACCUMULATIONS.

57 & 58 Vict. c. 16, s. 1, sub-s. 5—*Judicature—Procedure* - - - - 475
See PRACTICE. 2.

57 & 58 Vict. c. 30, ss. 1, 8 (sub-s. 4), 9, 14 (sub-s. 1), 21—*Finance Act* - 116
See REVENUE.

—— —— s. 6, sub-s. 8; s. 9, sub-s. 5 - 69
See SETTLED LAND. 2.

60 & 61 Vict. c. 65, s. 1, sub-s. 4—*Land Transfer* - - - - 583
See VENDOR AND PURCHASER. 1.

63 & 64 Vict. c. 48, s. 14—*Companies* - 527
See COMPANY. 3.

—— —— s. 14, sub-s. 1 (*d*) - - 284
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STAY OF PROCEEDINGS—Company—Winding-up - - - - - 174
See COMPANY. 10.

—— Step in proceedings—Application for stay—Summons for directions - - 222
See ARBITRATION.

STOP ORDER—Equitable assignment—Priority—Fund in court—Notice - - 26
See HUSBAND AND WIFE. 1.

—— Equitable execution—Effect of order—Unascertained residue—Charging order—Priority - - - - 727
See RECEIVER.

STREETS—*Building Line—Approval of Plans—Erecting Premises in advance of Building Line—"Written Consent" of Urban Authority—Indictable Offence—Statutory Penalty—Special Damage to adjoining Owner—Whether Action for Damages*

STREETS—*continued.*

maintainable—Local Government—Urban Authority—Public Health (Buildings in Streets) Act, 1888 (51 & 52 *Vict. c.* 52), *s.* 3—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 156.

The Public Health (Buildings in Streets) Act, 1888, s. 3, enacts that it shall not be lawful "without the written consent of the urban authority" to erect a building in any street beyond the front main wall of the building on either side thereof; and "any person offending against this enactment shall be liable to a penalty not exceeding 40*s.* for every day during which the offence is continued after written notice in this behalf from the urban authority:—

Held, that the offence prohibited by the section was one compound offence, consisting of building without consent and continuing after notice, for which a penalty was imposed to be exacted by the urban authority, and therefore gave no cause of action to a private individual to whom special damage was occasioned.

Rumball v. *Schmidt*, (1882) 8 Q. B. D. 603, discussed.

A builder submitted his plans of a proposed building to an urban authority in accordance with their by-laws. The plans shewed that the proposed building would infringe the building line. The plans were considered and passed by a committee of the urban authority, and then stamped "Approved" by the chairman of the committee. At a subsequent meeting of the general council of the urban authority a resolution was passed by which various acts and proceedings of the committee, including the passing of the said plans, were approved and adopted; and at the next general meeting of the council the minutes of the previous meeting were read and confirmed, and then signed by the chairman of the council:—

Held, that the above proceeding of the urban authority constituted a sufficient "written consent" for the purposes of s. 3 of the Act. MULLIS *v.* HUBBARD - - - **Farwell J. 431**

SUBSTITUTIONAL—Original or—Construction of will - - - - **206**
See WILL. 4.

SUMMONS FOR DIRECTIONS—Application for stay—Step in proceedings - **222**
See ARBITRATION.

SURETY—Principal and.
See under PRINCIPAL AND SURETY.

TAXATION—Costs—Bill payable by trustee—Taxation by beneficiaries—Prospective costs - - - - **518**
See SOLICITOR. 1.

—— Costs—Common order—Extension of time—Jurisdiction of taxing master - **394**
See PRACTICE. 4.

—— Costs—"Instructions for originating summons" - - - - **156**
See PRACTICE. 5.

—— Solicitors' costs.
See under SOLICITOR.

TENANCY IN COMMON—Joint tenancy or—Construction of will - - **206**
See WILL. 4.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TENANT FOR LIFE.
See under SETTLED LAND.

TENANT IN COMMON—Renewal by one—Lease—Fiduciary relation - - **40**
See LANDLORD AND TENANT. 4.

TIMBER—Ornamental—Equitable waste—Evidence—Injunction - - **664**
See WASTE.

TIME—Costs—Taxation—Common order—Extension of time—Jurisdiction of taxing master - - - - **394**
See PRACTICE. 4.

—— Omission to fix—Undertaking—Motion for attachment - - - - **312**
See ATTACHMENT.

TITLE—Trust, Purchase of land in breach of—Power of trustee to sell - - **362**
See VENDOR AND PURCHASER. 2.

TITLE-DEEDS.
See under DEEDS.

TRADE—Fixtures—Tenant's right of removal
See LANDLORD AND TENANT. 3. **268**

TREASURE TROVE—"Franchises"—Title of Crown—Jus tertii - - - **598**
See CROWN.

TRUST—Resulting—Presumption—Evidence—Capital or income - - - **98**
See HUSBAND AND WIFE. 2.

TRUSTEE—*Appointment of New Trustees—Donee of Power appointing Himself—Validity of Appointment.*

There is no rule that a donee of a power to appoint new trustees is unable to appoint himself. The Court will sanction such an appointment in special circumstances. MONTEFIORE *v.* GUEDALLA **Buckley J. 723**

2. — *Breach of Trust—Following Trust Money—Banking Account—Mixed Fund—Investment—Appropriation of Payments.*

Where a trustee paid trust money into his banking account whereby it became mixed with his own money, and out of moneys drawn from the account purchased an investment in his own name, but subsequently applied the balance to his own purposes, his representatives cannot successfully maintain that the investment was purchased out of the trustee's own money, and that what has been spent, and can no longer be traced and recovered, was the money belonging to the trust.

Brown v. *Adams*, (1869) L. R. 4 Ch. 764, is overruled by *In re Hallett's Estate*, (1880) 13 Ch. D. 696. *In re* OATWAY. HERTSLET *v.* OATWAY - - - - **Joyce J. 356**

—— Costs—Bill payable by trustee—Taxation by beneficiaries—Prospective costs **518**
See SOLICITOR. 1.

—— Executor.
See under EXECUTOR.

—— Fiduciary relation—Lease—Renewal by one tenant in common - - - **40**
See LANDLORD AND TENANT. 4.

TRUSTEE—*continued.*

—— Settled Land Acts, Trustees for purposes of —Compound Settlement - - 150
See SETTLED LAND. 1.

—— Title—Purchase of land in breach of trust —Power of trustee to sell - - 362
See VENDOR AND PURCHASER. 2.

—— Title-deeds—Solicitor—Partner, Liability for acts of—Duty of solicitor to cestui que trust - - - - 615
See SOLICITOR. 3.

UNION—Parish—Transfer of land from one parish to another—Alteration of boundaries of union - - - 142
See LOCAL GOVERNMENT.

VENDOR AND PURCHASER — *Copyholds — Equitable Interest—Devolution—Person to convey —Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1, *sub-s.* 4.

In sub-s. 4 of s. 1 of the Land Transfer Act, 1897, providing that the expression "real estate" in Part I. of the Act is not to be deemed to include "land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant," the concluding words apply to land of copyhold tenure as well as customary freehold.

Therefore an equitable estate or interest in copyholds devolves, on the death of the owner, on his personal representative or personal representatives as if it were a chattel real vesting in him or them. *In re* SOMERVILLE AND TURNER'S CONTRACT - - - **Kekewich J. 583**

2. — *Title—Purchase of Land in Breach of Trust—Power of Trustee to sell.*

B., the trustee of the will of his deceased wife, invested trust moneys in the purchase of a leasehold house, being an unauthorized investment. The persons beneficially entitled were two infants, who or the survivor of whom took the property if and when they attained twenty-one, and, in default of either attaining that age, the testatrix's next of kin. B. died, and his executors contracted to sell the house:—

Held, that as some of the beneficiaries were not capable of electing to take the property in its existing state, the executors could make a good title without the concurrence of any beneficiary. *In re* JENKINS AND H. E. RANDALL & CO.'S CONTRACT - - - **Swinfen Eady J. 362**

—— Building scheme—Restrictive stipulations —Right to enforce—Notice - 212
See BUILDING.

—— Friendly society, Mortgage to—Sale by auction—Purchase by officer of society—Invalidity - - - - 647
See MORTGAGE. 2.

—— Mistake—Life policy, Sale of—Death of assured before contract - - 249
See INSURANCE, LIFE. 1.

—— Title—Compound settlement—Trustees for purposes of Settled Land Acts - 150
See SETTLED LAND. 1.

VENTRE SA MÈRE—Children—Remoteness—Retrospective operation of gift—Relation back - - - - - 411
See PERPETUITY.

VESTING—"Die without leaving children"—"Having had" - - - - 299
See WILL. 5.

—— Gift, after life interest, to children of tenant for life "or legal representatives" 200
See WILL. 6.

VOLUNTARY SETTLEMENT — *Real Estate — Grant to Trustee—Refusal to act—Disclaimer by Grantee—Revesting of Legal Estate—Validity of Settlement—Mortgage of part of Settled Property—Marshalling for Payment of Mortgage—Priority of Cestuis que Trust*

By a voluntary settlement of 1866, real estate was granted unto and to the use of a trustee upon certain trusts; the settlement contained the usual covenant for further assurance, but no power of revocation by the settlor. In 1867, the trustee executed a deed of disclaimer, and the settlor also purported to put an end to the settlement:—

Held, that the settlement was not thereby rendered inoperative, but that the trust was imposed on the settlor, on whom, by operation of law, the estate had revested after the creation of the trust.

Jones v. *Jones*, W. N. (1874) 190, followed.

Statement in Preston's notes to Sheppard's Touchstone, 7th ed. p. 285, that "from the moment there is evidence of disagreement" between the grantor and grantee, "then in construction of law the grant is void ab initio, as if no grant had been made," discussed and explained.

In 1888, the settlor mortgaged part of the property comprised in the voluntary settlement; in 1899, the mortgage was paid off, and a transfer thereof taken for the benefit of the settlor's estate.

Held, that the beneficiaries under the settlement were entitled to have the settlor's estate marshalled, and the mortgage discharged out of the unsettled portion of his assets. MALLOTT *v.* WILSON - - - **Byrne J. 494**

VOLUNTARY WINDING-UP—Company—Liquidator—Negligence - - 625
See COMPANY. 8.

VOTING — Company — Articles of association, Alteration of—Contract—Voting power
See COMPANY. 1. 506

WASTE—*Equitable Waste—Ornamental Timber —"Planted or left for Ornament or Shelter"—Evidence—Injunction.*

In an action to restrain the cutting of timber on the ground of equitable waste, the question to be decided is whether the timber was in fact planted or left for ornament or shelter, not whether it is ornamental or useful for shelter; but the Court will accept the evidence of competent persons, founded on inference from the present appearance and condition of the timber, as some evidence that it was so planted or left. WELD-BLUNDELL *v.* WOLSELEY - **Swinfen Eady J. 664**

WAY, RIGHT OF—*Customary Churchway—Manorial Custom—Evidence—Inhabitants of Parish at large.*

There may be a lawful and valid custom for

WAY, RIGHT OF—*continued.*

the inhabitants of a parish to have a churchway through the demesne of a manor which is within the parish. Primâ facie a custom in reference to a churchway is a parochial custom.

The plaintff was lord of the manor of I. and also of the manor of S., both within the parish of I. The defendant was the occupier of a tenement in the same parish, but in the manor of S. Across the demesne of the manor of I. was a footpath which ran in front of the plaintiff's mansion-house to the parish church, and the defendant claimed the right to use it as an inhabitant of the parish for the purpose of going to and from the church. In an action of trespass against the defendant, the plaintiff alleged that the path was not a churchway for the parishioners generally, but only by virtue of a manorial custom of the manor of I. for a certain class of the tenants of that manor, and in support of that contention tendered in evidence a memorandum made by one of his predecessors in title:—

Held, (1) on the evidence, that no such manorial custom existed; (2) that, if proved, it was doubtful whether it would be good in law; (3) that the memorandum was not admissible in evidence on behalf of the plaintiff; and (4) that the path was a churchway by custom for the inhabitants of the parish at large. BROCKLEBANK *v.* THOMPSON - - - - **Joyce J. 344**

2. —— *Permissive Enjoyment—General Words—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-s.* 2—*Ways enjoyed with the Land sold—Easement.*

The general words incorporated by the Conveyancing Act, 1881, in every conveyance not expressing a contrary intention, will pass to the purchaser all ways actually used by him at the date of the conveyance, though used only by permission of the vendor.

The defendant in this action was the owner of two houses adjoining each other, one in his own occupation, the other held by the plaintiff company under a lease from the defendant, and occupied by their managers and servants carrying on their business. The houses were separated by a roadway leading to and forming part of the defendant's yard. By permission of the defendant, renewed from time to time to successive managers, the plaintiffs' servants and their predecessors in title had used in business hours a way across the yard to a door opening thereon in the back part of their premises for all purposes of their business. The entrance to the yard was closed by wooden doors, which were always locked by the defendant at night, and he kept sole control of the key. The defendant sold to the plaintiff company the house leased to them, and conveyed it by deed containing no general words or reference to any right of way:—

Held, that such a right of way as the plaintiffs had actually enjoyed at the date of the deed passed to them by virtue of the general words inserted in the deed by the Conveyancing Act, 1881, though the enjoyment was wholly permissive and precarious. INTERNATIONAL TEA STORES COMPANY *v.* HOBBS - - **Farwell J. 165**

WIFE.

See under HUSBAND AND WIFE.

WILL—*Absolute Gift—Gift over on Death "without a Will and Childless"—Repugnancy.*

An executory gift over in the event of the donee of an absolute interest dying "without a will and childless" is void for repugnancy. *In re* DIXON. DIXON *v.* CHARLESWORTH **Swinfen Eady J. 458**

2. —— *Ademption—Charitable Legacy—Gift to Endowment Fund—Hospital—Particular Purpose.*

A legacy to the trustees of the endowment fund of a hospital is a legacy for a particular purpose, and is therefore adeemed by a gift of the same amount to the same trustees in the testator's lifetime. *In re* CORBETT. CORBETT *v.* LORD COBHAM - - - **Farwell J. 326**

3. —— *Forfeiture of Life Interest—"Alienate or incumber"—Petition in Bankruptcy by Tenant for Life—Construction of Will—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52).

Under a will property was given to one for life with a gift over in the event of his "alienating or incumbering, or agreeing to alienate or incumber," his interest. He presented a petition in bankruptcy, and on the same day was adjudicated a bankrupt on his own application:—

Held, that the petition in bankruptcy and adjudication consequent thereon constituted an alienation within the meaning of the gift over.

In re Amherst's Trusts, (1872) L. R. 13 Eq. 464, followed.

Ex parte Lovell, [1901] 2 K. B. 16, distinguished. *In re* COTGRAVE. MYNORS *v.* COTGRAVE **Kekewich J. 705**

4. —— *Original or Substitutional—Conjunctions "or" and "and"—Joint Tenancy or Tenancy in Common — Will — Construction — Gift after Life Estate to Children, to Grandchildren then living "or the Issue of such as may have died."*

Testator gave his property to trustees upon trust after the death of the survivor of his children to divide the same between and among his "grandchildren then living equally per stirpes and not per capita, or the issue of such as may have died (such issue taking a parent's share only), so that my grandchildren (or their issue) may take their shares equally in loco parentis":—

Held, that the gift to the issue of the grandchildren was original and not substitutional, and that a great-grandchild of the testator who predeceased his own parent and the last surviving tenant for life took a vested interest:

Held, also, that upon the whole will the issue of the grandchildren took as tenants in common.

Martin v. *Holgate*, (1866) L. R. 1 H. L. 175, followed.

In re Merrick's Trusts, (1866) L. R. 1 Eq. 551, considered and explained. *In re* WOOLLEY. WORMALD *v.* WOOLLEY - - **Joyce J. 206**

5. —— *Vested Interest—"Die without leaving Children"—Death of Child in Lifetime of Tenant for Life—Existence of Child known to Testator—"Leaving"—"Having had"—Will—Construction—Gift to A. for Life, with Remainder to Children—Gift over.*

It is a now well-settled principle that, where there is a gift by will to A. for life, and after his

WILL—*continued.*

death to his children in terms which give the children an absolute interest in A.'s lifetime, followed by a gift over "if A. dies without leaving children," the word "leaving" is so to be construed as not to destroy any prior vested interest: that is say, "without leaving children" should be read as "without leaving children who have attained vested interests"; and this principle of construction is not affected by the circumstance that the testator knew of the existence of a child of A. and that such knowledge appears on the face of the will itself.

A testatrix, after giving a legacy for the benefit of G. L. the younger, son of her nephew G. L. the elder, gave her residuary estate to trustees upon trust for conversion, and out of the proceeds to raise and invest a sum of 1000*l.* and pay the interest thereof to the said G. L. the elder for life, and after his death to divide the capital amongst his children equally; and in case of his death "without leaving any child or children," the same to fall into her residuary estate, which she gave to certain nieces equally.

G. L. the elder survived the testatrix and died having had five children all born before the date of the will, of whom four died in infancy before that date. The fifth, G. L. the younger, named in the will, survived the testatrix and died in his father's lifetime:—

Held (reversing Byrne J.), that G. L. the younger took an absolute vested interest at birth, which interest became, upon his death, transmissible to his representatives. *In re* COBBOLD. COBBOLD *v.* LAWTON - - - C. A. 299

6. —— *Vesting—Gift, after Life Interest, to Children of Tenant for Life "or Legal Representatives"—Children dying before Period of Distribution—Construction of Will.*

Testator gave a share of his residuary estate to each of his two daughters for their respective lives, and after their deaths their respective shares "to be equally divided between their respective children or legal representatives":—

Held, that "representatives" meant the representatives of the tenants for life and not those of the children; that the addition to the gift to the children of the words "or legal representatives" did not operate as a divesting clause, but constituted an alternative gift to arise only in the event of there being no child that took a vested interest: and consequently that all children of the daughters who survived the testator, or were born after his death, took vested interests notwithstanding that they might not have survived their respective mothers. *In re* ROBERTS. PERCIVAL *v.* ROBERTS Joyce J. 200

7. —— *"Wife" of a Person, Gift to for Life—Wife living at Date of Will—Second Wife, whether included — Persona Designata — Construction of Will.*

A testatrix gave her residuary estate to trustees to pay the income to her son for life, and after his decease to "his wife" for her life, with remainder, as to the capital, for such of "his children" as should attain twenty-one equally.

At the date of the will the son had a wife living and well known to the testatrix. The

WILL—*continued.*

wife died after the testatrix and the son married again:—

Held, that the word "wife" must bear its primâ facie meaning, as referring to the wife existing at the date of the will, there being no context to control that primâ facie meaning; and consequently, that on the death of the son his second wife took no interest under the gift.

Re Burrow's Trusts, (1864) 10 L. T. 184, approved.

In re Lyne's Trust, (1869) L. R. 8 Eq. 65, disapproved. *In re* COLEY. HOLLINSHEAD *v.* COLEY - - - - - C. A. 102

—— Accumulate surplus rents to buy land, Trust to—Will made before, but taking effect after passing of the Act - 330
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—— "And" - - - - - 206
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—— "without a will and Childless" - 458
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—— "Daily" - - - - 532
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—— "Floating charge" - - - 284
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—— "Franchises" - - - 598
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—— "Having had" - - - 299
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—— "Illusory" contract - - - 254
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—— "or the Issue of such as may have died"
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—— "die without having been Married" 84
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—— "Ornamental timber" - - 664
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—— "Planted or left for ornament or shelter"
See WASTE - - - - 664

—— "Possession" - - - - 16
See SETTLED LAND. 3.

—— "Representatives" - - - 200
See WILL. 6.

—— "Sewer" - - - - 695
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WORDS—*continued.*

—— "Sham" contract - - - 254
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—— "Tenant for life" - - - 16
See SETTLED LAND. 3.

—— "Timber" - - - - 664
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—— "Wife" - - - - - 102
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—— "without a Will and childless" - 458
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